Supreme Court, U.S.
FILED

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No.

In the

# Supreme Court of the United States

STARLIGHT SUGAR, INC., PAN AMERICAN GRAIN CO., INC.

*Petitioners,*

*versus*

NEFTALÍ SOTO, INDIVIDUALLY AND AS SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF THE COMMONWEALTH OF PUERTO RICO,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Whether the unavailability of qualified immunity depends not only on the existence of a "clearly established right" at the time of defendant's conduct but also the existence of a clearly established "source" for that right.

Whether the qualified immunity granted to public officials based on the finding that no clearly established law existed at the time of the official's conduct, may survive the concomitant determination that a constitutional right exists and therefore it is *a fortiori* from then on a clearly established right.

Whether it is consistent with qualified immunity doctrine to extend a grant of immunity to public officials for an undetermined amount of time, until a state Supreme Court resolves the issue that has been determined to be unclear; or until the Court of Appeals sees fit to determine that an existing right will become "clearly established".

Whether the Commerce Clause applies to the Commonwealth of Puerto Rico.

Whether, under whatever constitutional or statutory provisions govern the relationship of the United States and Puerto Rico, it is clearly established that Commonwealth officials cannot intentionally discriminate against interstate commerce to protect its local economic interests.

Whether a public official may enjoy qualified immunity from liability because the state law or regulation survives scrutiny under the rational nexus test of equal protection doctrine, even if such statute or regulation was applied to intentionally discriminate for a clearly illegitimate purpose.

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No.

In The

**Supreme Court Of the United States**

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Starlight Sugar, Inc., Pan American Grain Co., Inc.
Petitioners

v.

Neftalí Soto, Individually and as Secretary of the Department of Agriculture of the Commonwealth of Puerto Rico
Respondents

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On Petition For Writ of Certiorari
To The United States Court of Appeals
For The First Circuit

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## PETITION FOR WRIT OF CERTIORARI

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Petitioners, Starlight Sugar, Inc. and Pan American Grain Co, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in *Starlight Sugar, Inc., Pan American Grain, Co., Inc., v. Neftalí Soto, etc, et als, Case No.00-1487*, on June 11, 2001.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit in *Starlight Sugar, Inc. v. Neftali Soto, etc, et als.*, 253 F. 3d. 137 (1st Cir., 2001) is set forth in the Appendix hereto (App. 1a).

The Opinion and Order of the United States District Court for the District of Puerto Rico in *Starlight Sugar, Inc. v. Neftali Soto, etc, et als*, 86 F. Supp.2d 23 (D.C. P.R.2000) is set forth in the Appendix hereto (App. 18a).

## BASIS FOR JURISDICTION

The final judgement of the United States Court of Appeals for the First Circuit reversing the decision of the District Court for the District of Puerto Rico was entered on June 11, 2001. This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101 (c).

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 8:

"The Congress shall have Power.....
To regulate Commerce with Foreign Nations, and among the several states and with the Indian Tribes;..."

United States Constitution, Amendment V:

"No person shall be... deprived of life, liberty, or property, without due process of law...."

United States Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Section No. VI, Market Regulation No. 13 of the Department of Agriculture of the Commonwealth of Puerto Rico:

Containers

A. Refined sugar to be imported in Puerto Rico shall come in consumer size packages inside the corresponding shipping containers. For the purpose of this Regulation a consumer size package is that one whose net content does not exceed five (5) pounds.

B. Raw sugar, refined sugar for industrial use or sweeping to be imported for marketing and for processing in Puerto Rico, shall come in containers with a capacity up to two hundred (200) pounds only. Imported refined sugar for industrial use shall not be repacked in consumer size packages.

## STATEMENT OF THE CASE

In 1994 petitioner Pan American Grain imported approximately 80,000 pounds of sugar in bulk for consumer repackaging by Starlight Sugar Corp. (petitioner). Section VI of Market Regulation No. 13 of the Department of Agriculture of the Commonwealth of Puerto Rico prohibits the importation of sugar into Puerto Rico for consumer use unless the sugar has been packaged in consumer size bags prior to its arrival in Puerto Rico. Since Pan American Grain (petitioner) was not importing sugar in the two and five pound bag sizes required by Regulation No. 13, the Secretary of Agriculture issued a detention order prohibiting petitioners from selling the sugar to grocery stores in Puerto Rico. Petitioners sued seeking declaratory and injunctive relief and damages, alleging that the application of Regulation No. 13 violated their rights to engage in interstate commerce free of local restraints under the commerce and equal protection clauses of the United States Constitution.

The District Court granted petitioners' motion for a preliminary injunction, finding likelihood of success on the merits both under interstate commerce and equal protection analysis. (App. 40a). The District Court found that Regulation No. 13 was facially discriminatory against interstate commerce and that the government had put forth no legitimate government objective for the Regulation. The Court quoted from the record to demonstrate that as implemented by respondent, the Secretary of Agriculture (the Secretary) the purpose of Regulation No. 13 was to "protect the Sugar Corporation [of Puerto Rico] from competition" and protect the "market...that has...traditionally [belonged to] the Sugar Corporation". (App. 50a).

The Court of Appeals for the First Circuit affirmed the preliminary injunction granted by the District Court, finding Regulation No. 13 facially discriminatory and

"presuntively invalid". (App. 35a). Thereafter, in an opinion and order of February 14, 2000 (App. 18a) the District Court granted petitioners' request for permanent injunctive relief against the Secretary and denied the Secretary's claim of qualified immunity. The District Court found that the law was clearly established at the time of the Secretary's actions implementing Regulation No. 13 and that he knew or should have known that such enforcement violated petitioner's constitutional rights. The Secretary appealed the District Court's ruling to the Court of Appeals for the First Circuit.

On June 11, 2001, the First Circuit issued its judgment and opinion and reversed the District Court's decision denying the Secretary's motion for qualified immunity. Applying the first prong of the doctrine of qualified immunity, the First Circuit found that petitioners had "identified a deprivation of [a] constitutional right" to engage "in interstate trade free from restrictive state regulations", pursuant to its own clear precedents. (App. 1a, 6a-7a). Trailer Marine Transport Corp. v. Rivera Vazquez, 977 F. 2d 1 (1st Cir. 1992). Addressing then the question of whether that right was clearly established at the time of the Secretary's enforcement of Regulation No. 13, the Court found that it was not.

The Court noted that the Supreme Court to Puerto Rico has insinuated or implicitly held that the Commerce Clause may not apply to Puerto Rico, citing RCA v. Government of the Capital, 91 P.R.R. 404, 419 (1964). (App. 8a). The Court held that the least that could be said is that the Puerto Rico Supreme Court "has intimated that the applicability of the dormant Commerce Clause to Puerto Rico is an unresolved question". (App. 9a). Because of the existence of conflicting precedent from the state Supreme Court in which the alleged constitutional violation occurred, the First Circuit concluded that "the applicability of the dormant Commerce Clause to Puerto Rico is disputed, and,

thus, [petitioners'] attendant constitutional right is not clearly established". (App. 11a)[1]. Finally, in n5 the Court ruled that this finding of qualified immunity protection against a claim for damages that violates a constitutional right to engage in interstate commerce free of local restraints is prospective but would not last indefinitely. In n5 the First Circuit said: "This does not mean that a Commerce Clause right, such as the one identified in this case, will not be considered clearly established for purposes of qualified immunity analysis indefinitely in the face of continued silence on the question by the Puerto Rico Supreme Court and the United States Supreme Court". (App. 17a).

With regard to the equal protection claim the Court found (although not that explicitly) that under the first prong of the qualified immunity doctrine no constitutional right existed in the circumstances of this case. The Court reached this conclusion by upholding the validity of Regulation No. 13 on the basis of the rational relationship test of equal protection analysis. Since under the rational nexus test the statute or regulation may be upheld by any "rational speculation unsupported by evidence or empirical data" (App. 14a) or any plausible explanation or purpose, Regulation No. 13 was therefore valid and constitutional on its face. (App. 14a).

Petitioner has duly filed its petition for writ of certiorari within ninety (90) days of the judgment and opinion of the Court of Appeals for the First Circuit issued on June 11, 2001.

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[1]The operative word in this quotation is the word "is" instead of "was" (at the time of the Secretary's conduct the right at issue was not clearly established). (See discussion infra, at13).

## REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW MISAPPLIES THE DOCTRINE OF QUALIFIED IMMUNITY BY HOLDING THAT A CLEARLY ESTABLISHED "RIGHT" REQUIRES ALSO A CLEARLY ESTABLISHED "SOURCE"; AND IN HOLDING THAT THE IMMUNITY SURVIVES A PREVIOUS DETERMINATION THAT THE RIGHT EXISTS, FOR AN UNKNOWN PERIOD OF TIME THAT WOULD DEPEND ON THE PUERTO RICO SUPREME COURT WILLINGNESS TO EXPRESS ITSELF OR ON THE FIRST CIRCUIT DECISION IN THE FACE OF A "CONTINUED SILENCE" BY THE SUPREME COURT OF PUERTO RICO.

The qualified immunity doctrine requires at least two important steps. The first is to determine whether the claimant has alleged the deprivation of an actual constitutional right. This Court has referred to this first prong of the doctrine as a "determination of whether the plaintiff has asserted a violation of a constitutional right at all". See Sieger v. Gilley, 500 U.S. 226, 232, (1991); Harlow v. Fitzgerald, 457 U.S. 800 (1982), Graham v. Connor, 490 U.S. 386, (1999). The second step is to determine whether the right was clearly established at the time of defendant's alleged actions. This step should not be undertaken until the first has been decided, as the existence of the right is a necessary concomitant to the determination of whether such right was clearly established at the time of the events in question, and Courts should not "assume, without deciding, this preliminary issue". Siegert v. Gilley, at n5. A third step, which is really subsumed in the second step, may be added for purposes of clarity. That is, if both of the questions posed by the first two steps are answered in the affirmative, whether a reasonable official knew or should have known that his

actions violated clearly established law. See Harlow v. Fitzgerald, supra.

(a) The Commerce Clause and the "source-right" distinction

The doctrine of the dormant Commerce Clause was derived from the implicit requirements of the Clause to fill what Justice Jackson described as one of the "great silences" of the Constitution. The doctrine that state laws or local regulations are invalid under the Commerce Clause *ex propio vigore* where they unduly burden or discriminate against interstate or foreign commerce is the necessary concomitant of the political philosophy that informs all the provisions of the Federal Constitution. As Justice Cardozo explained: the theory is "that the people of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." Baldwin v. G.A.F. Seelig, Inc., 294 US 511, 522-23 (1935).

The dominant purpose of the grant of power to Congress to regulate commerce among the states is to foster economic integration and prevent local interference with the flow of the nation's commerce. H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 537-38 (1949). The Secretary's conduct at issue herein, that is, the intentional discrimination against out of state products for the purpose of protecting Puerto Rico's local sugar industry, clearly strikes at the heart of that political philosophy. "Where simple economic protectionism is effected by state legislation a virtually *per se* rule of invalidity has been erected". City of Philadelphia v. New Jersey, 437 US 617, 624 (1978).

The right of out- of- state sugar importers in Puerto Rico "to engage in interstate trade free from restrictive state regulation", Dennis v. Higgins, 498 US 439, 448 (1990), is not disputed. But the First Circuit confuses "right" with the

"source" of that right. It fails to distinguish between the "clearly established law" standard of the qualified immunity doctrine, and the uncertainty or lack of clarity of the "source" upon which that law may be predicated. Thus, even in the face of its own precedent in Trailers Marine Transport Corp. v. Rivera Vázquez, 977 F. 2nd 1 (1st Circuit 1992), where the First Circuit unequivocally found the Commerce Clause applicable to Puerto Rico, it nevertheless held in the present case that, for purposes of qualified immunity, at the time of the Secretary's conduct the Commerce Clause's applicability to the Island was not clearly established because the Supreme Court of Puerto Rico "has taken a different view". (App. at 8a). The First Circuit failed to recognize that any alleged uncertainty in the Supreme Court of Puerto Rico as to the applicability of the Commerce Clause refers to the possible "source" of the right; an uncertainty that does not necessarily splash over to the "clarity" of the right.

In 1964 the Puerto Rico Supreme Court held that the interstate commerce relation between Puerto Rico and the United States had "contours" that are different from the relationship between the states of the Union under the Constitution. RCA v. Government. of the Capital, 91 P.R.R. 404, 419 (1964) This statement can not in any way be construed to mean that the Puerto Rico Supreme Court was considering the possibility that local officials may be able to discriminate on purpose against interstate commerce in order to protect local economic interests. Indeed, the careful language used in RCA belies any attempt at such an interpretation. The conduct here at issue is very distant from those peripheral matters considered by the Court where a difference might exist between Puerto Rico and the states[2].

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[2]In RCA, the Supreme Court merely questioned the precise extent of the Commerce Clause's effect on the Commonwealth's powers, but did not resolve the question of protectionist measures. (The Court speculated that the Commonwealth of Puerto Rico may exercise the taxing power in a manner that perhaps would not be permissible to a state). The Court then

The question of whether the Commerce Clause applies to Puerto Rico or not is really the question of what constitutional or statutory provisions govern the politico-economic relationship between the United States and Puerto Rico. Under whatever constitutional or statutory provisions may ultimately be found to define that relationship, the purposeful discriminatory conduct at issue herein is clearly prohibited. Whether it be the territorial cause, the rights of the people of Puerto Rico as United States Citizens, Public Law 600, the Puerto Rico Federal Relations Act, the Commerce Clause, or a combination thereof (see Cordova & Simonpietri Ins. Agency, Inc., v. Chase Manhattan Bank, N.A., 649 F. 2nd 36, 41 (1st Cir. 1981)), it cannot be seriously posited that Puerto Rico would be able to discriminate on purpose against interstate commerce in order to protect its local economic interest.

This confusion between "source" and "right" has ominous ramifications for Puerto Rico and ignores previous opinions of this Court involving such uncertainties. In Examining Board of Engineers v. Flores De Otero, 426 U.S. 572 (1976) this Court held that Puerto Rico statutory

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examined the tax under the criteria applicable to a tax imposed by a state and held it valid. Puerto Rico's Supreme Court did not address the issue in subsequent cases since it was unnecessary. Indeed, recent cases analyzed the governmental actions at issue under the guidelines applicable to the states under the Commerce Clause, presuming its applicability to Puerto Rico. In Banco Popular of Puerto Rico v. Municipality, 126 D.P.R. 653 (1990) the Court discussed whether the challenged statute was unconstitutional under the Commerce Clause, assuming that it applies to Puerto Rico. Likewise, in Gómez Hermanos v. Secretario de Hacienda, 114 D.P.R. 397 (1983), the Court analyzed the validity of a local taxation under Commerce Clause scrutiny to determine that it was valid. In Iberia v. Secretary of the Treasury, 135 D.P.R. 57 (1994), the Court stated that it did not have to consider the applicability of the Commerce Clause because the dormant aspect was not an issue with regards to a tax expressly authorized by Congress. See also Marketing v. Departamento de Agricultura, 118 D.P.R. 319 (1987).

restrictions on the ability of aliens to engage in the otherwise lawful private practice of civil engineering is plainly unconstitutional under an equal protection analysis. At the same time, this Court declined to say whether it is the Fifth Amendment or the Fourteenth Amendment which provides the protection. (at 599). It is to be assumed that the uncertainty of the source here does not exonerate Puerto Rican officials sued for violation of equal protection rights that have been otherwise established.

The ramifications of the "source-right" confusion may also extend beyond Puerto Rico. What would happen, for example, with the application of the doctrine of qualified immunity to a claim under the right of privacy, established by this court since 1965 in the case of Griswold, et al. v. Connecticut, 381 U.S. 479 (1965)? Such a right would never be a "clearly established right" since it is derived from the "penumbras" or "emanations" of various guarantees contained in the First, Third, Fifth and Ninth Amendments to the Constitution or the substantive due process doctrine of the Due Process Clause of the Fourteenth Amendment, Washington v. Glucksberg, 571 U.S. 702 (1997).

Textual or "source" considerations should be relevant for the determination of whether the alleged right exists "at all". See Graham v. Connor, 490 U. S. 386, 395 (1989) for an emphasis on the identification and examination of a "textual source" in the context of substantive due process doctrine. See also County of Sacramento et al v. Teri Lewis, 523 U.S. 833, 842 (1998). However, once it is determined that the right exists, the "clearly established" prong of the qualified immunity doctrine should not turn on the certainty of "sources". Such an approach takes the application of the immunity into abstract realms totally unrelated to the purposes and policies which sustain and inform the doctrine. Under the First Circuit approach "standards of official conduct would tend to remain uncertain, to the detriment both

of officials and individuals". County of Sacramento, et al. v. Teri Lewis 523 U.S. 833, n5 (1998).

(b) A conflict of uncertainties

The United States Supreme Court has not determined to what extent lower federal court's and state court's interpretation of federal law constitute clearly established law or how the clarity of the law is affected by conflicting interpretations. In Newman v. Massachusetts, 884 F. 2nd 19 (1st Cir. 1989), the First Circuit held that its rulings create "clearly established" law within the Circuit. Other circuits have held that to determine if the federal law was clearly established, the Courts may look at the rulings of state courts, along with those of federal courts. See, Burgess v. Lowery, 201 F. 3d 942 (7th Cir. 2000). In both cases the courts rejected the notion that only decisions of the United States Supreme Court establish clear law for qualified immunity purposes. The precedents of the Seventh Circuit posit that the inquest should encompass all pertinent guidelines, including state and supreme court decisions; while recognizing that clarity does not require unanimity. See also Cinelli v. Cutillo, 896 F. 2d 650, 655 (1st Circuit 1990). Thus, there is a question as to the extent that state supreme court cases should be considered for the purpose of determining whether at the time of defendant's conduct the law was clearly established. Saphire, "Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law", 35 Arizona L. Rev. 621 (1993).

But the conflict of the First Circuit decision with the Seventh and other circuits is more profound. According to n5 (supra, p. 7, App. 17a), if the Puerto Rico Supreme Court fails to squarely address and resolve the applicability of the Commerce Clause to the Commonwealth of Puerto Rico, the First Circuit, at some time in the future will consider anew whether the Commerce Clause right at issue is "clearly

established". It is implicit in this reprieve, that at that moment the First Circuit will find such a right to be "clearly established law" in accordance with its own precedents.

The qualified immunity test is thereby turned on its head by the First Circuit. Usually, "a finding that a constitutional right does exist, in the context of a qualified immunity claim, implies the end of the immunity, because the right either has been established recently or concurrently with the Court's opinion and from that moment the conduct at issue is not protected. That is the essence of this Court's admonishment that in qualified immunity analysis the first step should always be to determine whether the plaintiff has alleged a deprivation of a constitutional right at all. County of Sacramento, supra, at n5. In Siegert v. Gilley, 500 U.S. 226, 232 (1991) this Court stated: "A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all", and courts should not "assume, without deciding, this preliminary issue". Addressing this preliminary issue the First Circuit held that petitioner had identified a deprivation of the constitutional right to "engage in interstate trade free from restrictive state regulation". (App. 7a).

If a right exists the Courts then look backwards to see if at the time of defendants conduct it was not yet clearly established law. But the First Circuit's grant of immunity continues now for an undetermined amount of time. The finding does not generate a clearly established law but creates a temporary immunity. It is a grant of qualified immunity for an uncertain amount of time that protects Puerto Rican officials who discriminate on purpose against interstate commerce to protect local economic interests. The key to the duration of that immunity is placed in the Puerto Rico Supreme Court's continued or uncontinued silence.

Presumably, at the end of that period, as long as it may be, the right that is now found unclear will suddenly be transformed into "clearly established law".

The First Circuit has thus thrown Puerto Rican officials into a quantum uncertainty. What are officials to do while considering a course of action which admittedly violates a recognized "right" that is not right now "clearly established"; or the "source" of which is not "clearly established", so as to make them personally liable? They have to consider that if the Puerto Rico Supreme Court declines the invitation to resolve the issue the ax may fall at any moment. Will it be a prospective or a retroactive ax? What are victims of such conduct to do?

The qualified immunity doctrine shields officials from liability when they could not reasonably be expected to know that their conduct was unlawful. Harlow, 457 U.S. at 818. *A contrario sensu,* an official is liable where he "could be expected to know that certain conduct will violate statutory or constitutional rights"(Id, at 819). After the First Circuit's opinion, officials in Puerto Rico know but are not liable; but they also know that they will be liable at some point in the future. Uncertainty is not just being detected to protect public officials but instead produced by the First Circuit's opinion. With this unprincipled approach the doctrine has been thrown into total disarray. The uncertainty examined and repudiated by this Court in County of Sacramento, supra, is here exponentially multiplied.

## II THE DECISION BELOW IN DISMISSING PETITIONER'S CLAIM UNDER EQUAL PROTECTION CONFUSES THE CONSTITUTIONALITY OF THE REGULATION ON ITS FACE UNDER THE RATIONAL NEXUS TEST WITH THE VALIDITY OF ITS APPLICATION FOR THE AVOWED PURPOSE OF DISCRIMINATING AGAINST INTERSTATE COMMERCE TO PROTECT PUERTO RICO'S LOCAL INDUSTRY

Just as the First Circuit's Commerce Clause analysis confuses "right" with "source", in finding no "clearly established law" for a claim that the conduct at issue violated petitioners' right to equal protection of the laws, the First Circuit confuses the constitutional validity of a statute or regulation on its face with the constitutionality of its application. Although the First Circuit was not explicit in this regard, it held that Petitioner had not satisfied the first prong of the qualified immunity test; since under the circumstances at issue no constitutional right exists "at all". It reached this conclusion by upholding Regulation No. 13 on the basis of the "rational relationship" test of equal protection analysis. The First Circuit thus confused the issue of whether the Secretary's actions violated clearly established law in the area of equal protection with the issue of whether the regulations themselves may be held to be constitutional under the rational nexus criteria. At the time of the Secretary's conduct there was clear Supreme Court precedent establishing that this admittedly discriminatory treatment violated petitioner's right under equal protection doctrine. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). It is clear that the protection of intrastate business by discriminating against non resident competitors is not a legitimate state purpose. Metropolitan Life Insurance Co.v. Ward, 470 U.S. 869 (1985). See also, Minnesota v. Clover

Leaf Creamery Co., 449 U.S. 456 (1981), (objectives articulated by the legislature will be assumed to be actual purposes of the statute unless circumstances demonstrate otherwise; such as in the present case, where the circumstances of the application of the rule demonstrate an invalid purpose.); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) (the health articulation may actually disguise the illegitimate objective of economic protectionism, since "economic welfare is always related to health..."; the police power may not be used to establish a barrier against out of state competition).

Although a state regulation may be saved by the rational nexus test; where any "plausible" justification will suffice, and where the party challenging the regulation bears the burden of "negating every conceivable basis which might support it", Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973); FCC v. Beach Communications, Inc., 508 U.S. 307, 313-14 (1993), the application of such regulation with a clear and undisputed discriminatory animus for an illegitimate purpose is unconstitutional. Thus, it was "clearly established law" at the time of the Secretary's conduct that petitioner had a right to be free from the application of Regulation No. 13 for a discriminatory and non legitimate purpose.

## CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the First Circuit and, ultimately, to vacate and reverse the finding of qualified immunity and remand the matter to the District Court for trial.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 00-1487

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

STARLIGHT SUGAR, INC., PAN AMERICAN GRAIN CO., INC.,
Plaintiffs, Appellees,

v.

NEFTALI SOTO, INDIVIDUALLY AND AS SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF THE COMMONWEALTH OF PUERTO RICO,
Defendant, Appellant,

SUGAR CORPORATION OF PUERTO RICO ("LA CORPORACION AZUCARERA DE PUERTO RICO"), MANUEL DIAZ SALDANA, INDIVIDUALLY AND AS SECRETARY OF THE DEPARTMENT OF THE TREASURY OF THE COMMONWEALTH OF PUERTO RICO.

June 11, 2001, Decided

COUNSEL:
Richard H. Fallon, Jr., with whom Juan A. Lopez-Conway and Garcia & Fernandez, were on brief, for appellant.

Eduardo A. Vera-Ramirez, with whom Ramirez Lavandero, Landron & Vera, were on brief, for appellees.

JUDGES:

Before Torruella, Chief Judge, Lipez, Circuit Judge, and Garcia-Gregory, * District Judge.

* Of the District of Puerto Rico, sitting by designation.

OPINIONBY:
TORRUELLA

OPINION:

TORRUELLA, Chief Judge. This is an appeal from an Opinion and Order denying appellant Neftali Soto's qualified immunity defense. Soto, acting in his capacity as Secretary of the Department of Agriculture of the Commonwealth of Puerto Rico, has been sued in his personal capacity under 42 U.S.C. § 1983 for enforcing a sugar regulation that prevented appellees, Starlight Sugar, Inc. and Pan American Grain Company, Inc. ("Starlight/PanAm"), from importing sugar into Puerto Rico in bulk for packaging in consumer-sized units. We reverse the district court opinion and hold that Soto is entitled to qualified immunity.

BACKGROUND

Section VI of Market Regulation No. 13 prohibits the importation of sugar into Puerto Rico for consumer use unless the sugar has been packaged in consumer-sized bags (two- and five-pound bag sizes) prior to its arrival in Puerto Rico.[1] In other words, sugar cannot be shipped to Puerto Rico in bulk for packaging in Puerto Rico. It is undisputed that the effect of this regulation is to prevent sugar intended for consumer use from being brought into Puerto Rico.

An explanation of the history of the sugar industry in Puerto Rico is provided in the district court opinion granting Starlight/PanAm a preliminary injunction, Starlight Sugar, Inc. v. Soto, 909 F. Supp. 853, 855-56 (D.P.R. 1995) [hereinafter Starlight Sugar I], aff'd, 114 F.3d 330 (1st Cir. 1997) [hereinafter Starlight Sugar II], and need not be retold

here. A summary of the litigation history of Market Regulation No. 13, however, is worth noting.

The prohibition on repackaging imported sugar was first challenged in the Puerto Rico court system in 1984. While the Puerto Rico Supreme Court was considering the issue, a concurrent suit was filed in federal district court in 1987. The district court stayed the proceedings pending a decision by the Puerto Rico Supreme Court. On November 30, 1987, the Puerto Rico Supreme Court rendered such a decision, upholding Regulation No. 13 against due process and equal protection claims based on the Puerto Rico Constitution. Puerto Rico Sugar Corp. v. Garcia, CE-85-481, RE-85-496, P.R. Offic. Trans. Sugar repacker Garcia returned to the federal district court seeking relief in that forum. The district court, after dismissing the claims brought under the Due Process and Equal Protection Clauses of the United States Constitution, held that a claim could be maintained under the Commerce Clause, because such a claim could not have been litigated in the Puerto Rico courts.[2] Garcia v. Bauza Salas, 686 F. Supp. 965, 967 (D.P.R. 1988) ("under Puerto Rican law, as espoused by the Puerto Rico Supreme Court, the clause is inapplicable to the Island"). The district court went on to enjoin enforcement of the regulation. Id. at 974. On appeal, this Court vacated the injunction, holding that the district court's action violated the Anti-Injunction Act, 28 U.S.C. § 2283, because the order enjoining enforcement of Regulation No. 13 directly conflicted with the injunction affirmed by the Puerto Rico Supreme Court barring Garcia from repackaging sugar in Puerto Rico. Garcia v. Bauza Salas, 862 F.2d 905, 907-08 (1st Cir. 1988).

In 1994, appellee Pan American Grain imported approximately 80,000 pounds of sugar into Puerto Rico for consumer repackaging by appellee Starlight Sugar. Pursuant to Regulation No. 13, the Department of Agriculture issued a detention order prohibiting appellees from selling the sugar to grocery stores in Puerto Rico. Starlight/PanAm sued, seeking

declaratory and injunctive relief, as well as damages, and based their challenge of Regulation No. 13 on the Commerce and Equal Protection Clauses of the United States Constitution.

The district court granted Starlight/PanAm's motion for preliminary injunctive relief, holding that there was a likelihood of success on the merits as to both the Commerce Clause and equal protection arguments. Starlight Sugar I, 909 F. Supp. at 861. The court found that Regulation No. 13 "facially discriminates against interstate commerce" and that the government had failed to assert a compelling interest sufficient to justify this "discriminatory purpose and effect," thus implicating the Commerce Clause. Id. In addition, the district court held that the government had put forth no "legitimate government objective" for Regulation No. 13, and that the regulation, therefore, likely violated the Equal Protection Clause. Id.

This Court affirmed the grant of the preliminary injunction, finding "no abuse of discretion and no error of law." Starlight Sugar II, 114 F.3d at 331. Regarding the likelihood of success on the merits, we "noted" that "Commerce Clause caselaw strongly supports the position of the plaintiff sugar importers." Id. We characterized Regulation No. 13 as "facially discriminatory," and thus "presumptively invalid." Id.

In the most recent development of this case, the district court ruled, in an Opinion and Order, in favor of Starlight/PanAm's Motion for Summary Judgment. Starlight Sugar, Inc. v. Soto, 86 F. Supp. 2d 23 (2000) [hereinafter Starlight Summary Judgment]. The court affirmed its prior intimations that Market Regulation No. 13 violated both the Commerce and Equal Protection Clauses. Pursuant to this finding, the district court granted injunctive relief against Soto. The court next turned to Starlight/PanAm's § 1983 claim for damages against Soto in his personal capacity, and,

in that context, analyzed Soto's assertion of qualified immunity.

Citing Harlow v. Fitzgerald, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1981), the district court identified a two-part test for determining whether an official is entitled to qualified immunity: (1) whether the law was clearly established at the time the action was taken; and (2) if so, whether the official knew or reasonably should have known that the action or inaction would violate petitioner's constitutional rights. Id. at 818. The district court found that the law was clearly established and that Soto knew or should have known that enforcement of Market Regulation No. 13 violated Starlight/PanAm's constitutional rights. The court called the Commerce Clause "a cornerstone of our economy and our country" and was "hard pressed to believe that Soto, an attorney, would be unaware of the existence of the Commerce Clause." Starlight Summary Judgment, 86 F. Supp. 2d at 30. In a footnote, the court stated, "A similar result is found when analyzing the Equal Protection Clause . . . ." Id. at 30 n.9.

Appellant Soto brings this interlocutory appeal pursuant to 28 U.S.C. § 1291, challenging only the district court's rejection of his qualified immunity defense. See Mitchell v. Forsyth, 472 U.S. 511, 530, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1984). Entitlement to the defense of qualified immunity is a question of law subject to de novo review. See, e.g., Elder v. Holloway, 510 U.S. 510, 516, 127 L. Ed. 2d 344, 114 S. Ct. 1019 (1994). Accordingly, we proceed to the merits of this appeal.

DISCUSSION

This Court has identified a three-step process for evaluating qualified immunity claims: (1) whether the claimant has alleged the deprivation of an actual constitutional right; (2) whether the right was clearly established at the time of the alleged action or inaction; and

(3) if both of these questions are answered in the affirmative, whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right. Nelson v. Kline, 242 F.3d 33, (1st Cir. 2001); Abreu-Guzman v. Ford, 241 F.3d 69, 73 (1st Cir. 2001); see Wilson v. Layne, 526 U.S. 603, 609, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999). This particular order of analysis "is designed to 'spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn-out lawsuit.'" Wilson, 526 U.S. at 609 (quoting Siegert v. Gilley, 500 U.S. 226, 232, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991)). Addressing the constitutional question first "promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public." Id.

The district court held that Market Regulation No. 13 violated clearly established Commerce Clause and Equal Protection Clause caselaw. We will examine both, turning first to the Commerce Clause claim.

A. Commerce Clause Analysis

In explaining "dormant" Commerce Clause jurisprudence, the district court quoted the following passage:

> This "negative" aspect of the Commerce Clause prohibits economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. . . . Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.

Starlight Sugar I, 909 F. Supp. at 857 (quoting West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 192-93, 129 L. Ed. 2d 157, 114 S. Ct. 2205 (1994) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-74, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988))). The district court found Market Regulation No. 13 to be facially discriminatory, falling within a category of government regulation that the dormant Commerce Clause renders invalid. The court further held that Soto had failed to advance any justification for the repackaging prohibition that did not ultimately amount to economic protectionism.[3] 909 F. Supp. at 860-61; see also Starlight Sugar II, 114 F.3d at 331-32.

The Commerce Clause "confers a 'right' to engage in interstate trade free from restrictive state regulation." Dennis v. Higgins, 498 U.S. 439, 448, 112 L. Ed. 2d 969, 111 S. Ct. 865 (1990). We agree with the district court that Starlight/PanAm have identified a deprivation of this constitutional right. The next question to address is whether this right was clearly established at the time of Soto's enforcement of Regulation No. 13. We hold that it was not.

Citing First Circuit precedent, the district court stated that: "The constraints of the dormant Commerce Clause apply equally to Puerto Rico." Starlight Sugar I, 909 F. Supp. at 858. In Trailer Marine Transport Corp. v. Rivera-Vazquez, 977 F.2d 1 (1st Cir. 1992), we explicitly considered "whether and how the Commerce Clause constrains legislation and administrative action of Puerto Rico." Id. at 6. Characterizing Puerto Rico's status as "unique," we noted that Puerto Rico has no voting representation in Congress, that Congress may fashion laws in a manner that treats Puerto Rico differently from the states, that not all federal constitutional rights apply in Puerto Rico, and that it has not been determined whether Puerto Rico is governed by the Fifth or by the Fourteenth Amendment. Id. at 7. Nevertheless, we concluded that

Puerto Rico is bound by the dormant Commerce Clause in the same way that the states are. The Commerce Clause's purposes of "fostering economic integration and preventing local interference with the flow of the nation's commerce . . . apply with equal force to official actions of Puerto Rico." Id. at 8. In addition, we found that Puerto Rico enjoys sufficient autonomy as an entity to justify treating it as independent of Congress and thus subject to dormant Commerce Clause restraints. Id.

The Supreme Court of Puerto Rico, we have noted, "has taken a different view." Id. at 9. Commenting on the scope of the application of the Commerce Clause to Puerto Rico, that court said: "This interstate commerce relation [between Puerto Rico and the United States] has constitutionaily had, and still has, contours which are different from the relation which under the Constitution prevails among states of the Union." R.C.A. v. Government of the Capital, 91 D.P.R. 404, 419 (P.R. 1964). This amorphous statement eludes concrete interpretation, and the opinion itself fails to further elaborate on how Puerto Rico's relationship with the United States would affect the application of the Commerce Clause to Puerto Rico. Subsequent decisions by the Puerto Rico Supreme Court are similarly unilluminating. See, e.g., Iberia v. Secretario de Hacienda, 135 D.P.R. 57, 72-73 & n.11 (P.R. 1993) (finding it unnecessary to comment on the applicability of the Commerce Clause to Puerto Rico); Marketing v. Departamento de Agricultura, 118 D.P.R. 319 (P.R. 1987) (deciding that the dormant Commerce Clause question need not be answered in the course of decision). One interpretation of the R.C.A. language by this Court, as illustrated by our comment in Trailer Marine, and the Puerto Rico federal district courts is that the dormant Commerce Clause does not apply to Puerto Rico. Garcia, 686 F. Supp. at 968; Sea-Land Servs., Inc. v. Municipality of San Juan, 505 F. Supp. 533, 542 (D.P.R. 1980). In an earlier opinion, however, we rejected an argument that the Puerto Rico courts were closed

to a Commerce Clause claim, stating that: "In our view, the position taken by the Supreme Court of Puerto Rico in [R.C.A.] is far more flexible." Carrier Corp. v. Perez, 677 F.2d 162, 165 (1st Cir. 1982).

In an effort to clarify how we interpret the Puerto Rico Supreme Court's position, we offer the following commentary. First, the R.C.A. case offers the only substantive statement on application of the Commerce Clause to Puerto Rico by the Puerto Rico Supreme Court. It, at minimum, suggested that there could be situations in which the Commerce Clause would not apply to Puerto Rico, even though it would constrain a State in comparable circumstances. Second, the R.C.A. case was written in 1964, and the relationship between Puerto Rico and the United States has been refined and clarified since that time. See, e.g., Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572, 595, 49 L. Ed. 2d 65, 96 S. Ct. 2264 (1976) ("the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States"). Noting that in more recent years Puerto Rico has acted and been treated more like a state, we overturned our 1947 holding in Buscaglia v. Ballester, 162 F.2d 805 (1st Cir. 1947), that the dormant Commerce Clause did not apply to Puerto Rico. Trailer Marine, 977 F.2d at 9. The R.C.A. decision relied, at least in part, on Buscaglia. R.C.A., 91 D.P.R. at 419 n.9. Perhaps recognizing that the status of Puerto Rico is not as was perceived at the time that R.C.A. was decided, and that the precedential underpinnings for its Commerce Clause comments have been weakened, the Puerto Rico Supreme Court has intimated that the applicability of the dormant Commerce Clause to Puerto Rico is an unresolved question. See Iberia, 135 D.P.R. at 72-73 & n.11; Marketing, 118 D.P.R. at 319. Unfortunately, this has not spurred the Puerto Rico Supreme Court to address the issue squarely. As a result, we are left with the vague language in R.C.A. that the

Commerce Clause, as applied to Puerto Rico, has "contours which are different" from those when applied to the States. 91 D.P.R. at 419. From this conclusion, we proceed with the qualified immunity analysis.

When determining whether a constitutional right is clearly established for purposes of qualified immunity, state,[4] as well as federal, decisions can be considered. See Cinelli v. Cutillo, 896 F.2d 650, 655 (1st Cir. 1990) (citing a Massachusetts Supreme Judicial Court opinion at length in concluding that the right was clearly established). The Seventh Circuit has commented:

> State judges like federal judges take an oath to uphold the Constitution of the United States, and unlike the converse case of federal judges enforcing state law, where it is accepted that the ultimate authority on questions of state law resides with state rather than federal courts, the federal courts of appeals do not have the ultimate authority to decide issues of federal law.

Burgess v. Lowery, 201 F.3d 942, 945 (7th Cir. 2000). In turning to both the state and federal case law in this instance, we find a potential conflict.

In Trailer Marine, as noted, we held that the dormant Commerce Clause applies to Puerto Rico; the Puerto Rico Supreme Court took a different view in the R.C.A. case. The United States Supreme Court has anticipated this potential for disagreement: "Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system. Understandably this dual court system is bound to lead to conflicts and frictions." Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 286, 26 L. Ed. 2d 234, 90 S. Ct. 1739 (1970).

In the past, we have held that a right can be treated as clearly established in this circuit if we have unequivocally identified that right in prior decisions, regardless of Supreme Court silence on the subject or a lack of unanimity among the circuits. Newman v. Massachusetts, 884 F.2d 19, 25 (1st Cir. 1989). However, Newman did not address whether a right could be considered clearly established in a case such as this, where there is arguably contrary authority from the highest court of a state within the First Circuit. This distinct circumstance necessarily impacts our view on whether a right is clearly established.

The Seventh Circuit has stated that an official should not be shielded by the defense of qualified immunity simply because there is "one contrary decision at either the federal court of appeals or the state supreme court level." Burgess, 201 F.3d at 946 (involving the constitutionality of strip searching prison visitors without reasonable suspicion). Again, the precedent under examination in Burgess may be distinguished, as the only conflicting authority came from a state court in another circuit, the Supreme Court of Hawaii. Because neither Burgess nor Newman dealt with conflicting precedent from a state within the circuit, much less conflicting precedent from the state in which the alleged constitutional violation occurred, our reliance on them for guidance in our assessment of qualified-immunity in this case is necessarily circumspect.

We conclude that the applicability of the dormant Commerce Clause to Puerto Rico is disputed, and, thus, appellees' attendant constitutional right is not clearly established.[5] Our holding is consistent with and respects the role of state systems in identifying and defining federal constitutional rights on a parallel basis with the federal courts with ultimate supervisory authority to harmonize any potential conflicts residing in the United States Supreme

Court.[6] Soto is, therefore, protected by the qualified immunity defense as far as the Commerce Clause challenge is concerned.

B. Equal Protection Analysis

The district court provided limited explanation for its conclusion that Soto's enforcement of Market Regulation No. 13 violated the Equal Protection Clause, citing only Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, 880, 84 L. Ed. 2d 751, 105 S. Ct. 1676 (1985) [hereinafter MetLife], in support of its conclusion. Starlight Sugar I, 909 F. Supp. at 861. The district court's treatment was even more summary in denying Soto's qualified immunity defense, disposing of the equal protection issue with a footnote reference to the Opinion's Commerce Clause findings. Starlight Summary Judgment 86 F. Supp. 2d at 30 n.9. A review of MetLife reveals that Commerce Clause and Equal Protection Clause analysis should not be conflated:

> Under Commerce Clause analysis, the State's interest, if legitimate, is weighed against the burden the state law would impose on interstate commerce. In the equal protection context, however, if the State's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish.

470 U.S. at 881. The district court, then, did not sufficiently consider whether Market Regulation No. 13 violated the Equal Protection Clause, and we do not adopt the court's findings or conclusion in this regard.

If neither a fundamental right nor a suspect classification is involved in an Equal Protection Clause challenge, courts will uphold legislation that provides for differential treatment

upon a mere showing of a rational relationship between the disparate treatment and a legitimate government objective. Fireside Nissan, Inc. v. Fanning, 30 F.3d 206, 219 (1st Cir. 1994). In making such an inquiry, any "plausible" justification will suffice, and effectively ends the analysis. FCC v. Beach Communications, Inc., 508 U.S. 307, 313-14, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993). In fact, the party challenging the legislation bears the burden of "negating every conceivable basis which might support it." Id. at 315 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364, 35 L. Ed. 2d 351, 93 S. Ct. 1001 (1973)).

The district court addressed one government justification of Market Regulation No. 13, namely, protection of the local sugar industry, and cited MetLife for the proposition that this is not a legitimate government objective. Starlight Sugar I, 909 F. Supp. at 861. We are not persuaded that MetLife is so broad; in fact, it expressly limits its holding to the particular facts of the case: "This case does not involve or question . . . the broad authority of a State to promote and regulate its own economy. We hold only that such regulation may not be accomplished by imposing discriminatorily higher taxes on nonresident corporations solely because they are nonresidents." 470 U.S. at 882 & n.10.

Even if Soto's stated justification for enforcing Market Regulation No. 13 is insufficient to uphold the rationality of the legislation, this Court is obligated to seek out other conceivable reasons for validating Regulation No. 13. Here, the Introduction to Market Regulation No. 13 provides a health and safety justification: "to guarantee that imported sugar that may be marketed in Puerto Rico meets certain minimum quality requirements." That this was not the reason provided by Soto for his enforcement is irrelevant to an equal protection inquiry. See Beach Communications, 508 U.S. at 315.

Although this issue was never addressed by the parties, the district court discussed, and dismissed, the health and safety argument. Starlight Sugar I, 909 F. Supp. at 860. The district court pointed out that there had been no complaints as to the quality of imported sugar prior to the ban on repackaging, and that the Department of Agriculture does not conduct "wholesomeness" inspections. Id. In addition, the court commented that there were less burdensome methods for ensuring the quality of imported sugar than the restrictions found in Regulation No. 13. Id.

We do not doubt the district court's observations in this regard. For the most part, however, they are only relevant to Commerce Clause, not Equal Protection Clause, analysis. For one, equal protection does not demand that a State employ less burdensome alternatives if those are available. A court's belief that the legislature's alleged goals could be accomplished through more reasonable means is irrelevant to rational-basis review. Beach Communications, 508 U.S. at 314. In addition, the district court conceded that: "it is true that section V of Regulation 13 establishes minimum quality standards for sugar brought into Puerto Rico." Starlight Sugar I, 909 F. Supp. at 860. Given the regulation's stated purpose of quality control, and the specifications throughout that appear to intend to further that goal, it is at least "plausible" that Section VI of Regulation No. 13 is rationally related to health and safety considerations. Since equal protection analysis does not subject "legislative choice . . . to courtroom factfinding," and a court may uphold such legislation on the basis of "rational speculation unsupported by evidence or empirical data," Beach Communications, 508 U.S. at 315, we need go no further.

## CONCLUSION

We hold that Starlight/PanAm's Equal Protection Clause challenge to Secretary Soto's enforcement of Market Regulation No. 13 fails at the first step of the analysis, demonstrating the actual deprivation of a constitutional right, and that Soto is accordingly protected by the defense of qualified immunity. Based on this and our earlier conclusion that the applicability of the dormant Commerce Clause to Puerto Rico is not "clearly established," appellant Soto cannot be held personally liable for his actions. The district court's decision with respect to Soto's qualified immunity defense is reversed.

FOOTNOTES

[1] Puerto Rico Department of Agriculture Market Regulation No. 13, Sec. VI--Containers reads, in relevant part:

> A. Refined sugar to be imported in Puerto Rico shall come in consumer size packages inside the corresponding shipping containers. For the purposes of this Regulation a consumer size package is that one whose net content does not exceed five (5) pounds.
>
> B. . . . . Imported refined sugar for industrial use shall not be repacked in consumer-size packages.

[2] The Puerto Rico Supreme Court's holdings on the applicability of the Commerce Clause to Puerto Rico will be discussed later in this Opinion.

[3] Belated citation at oral argument to the quality control purpose articulated in the Introduction to Market Regulation No. 13 is unavailing to Soto as to the Commerce Clause challenge, because it was never presented in the lower court, nor was it fully briefed on appeal. See, e.g., King v. Town of Hanover, 116 F.3d 965, 970 (1st Cir. 1997). This justification will be discussed in greater depth, however, in the equal protection section of this Opinion.

[4] Decisions of the Puerto Rico Supreme Court in these circumstances should be considered to have the same force as if they originated in a state supreme court. See Cruz v. Melecio, 204 F.3d 14, 22-25 (1st Cir. 2000) (ordering stay of federal district court proceedings pending resolution by the

Puerto Rico Supreme Court of a parallel suit: "the case before the Puerto Rico Supreme Court is more comprehensive than the newer federal case because it covers both commonwealth and federal constitutional claims. Plainly, the interests of judicial efficiency and eliminating piecemeal litigation favor resolving these closely related claims in a single forum.").

[5] This does not mean that a Commerce Clause right, such as the one identified in this case, will not be considered clearly established for purposes of qualified immunity analysis indefinitely in the face of continued silence on the question by the Puerto Rico Supreme Court and the United States Supreme Court.

[6] Prior to 1961, the First Circuit was empowered to review decisions of the Puerto Rico Supreme Court that resolved federal questions. 28 U.S.C. § 1293 (1959); 28 U.S.C. § 1294(6)(1959). In 1961, § § 1293 & 1294(6) were repealed, and since then, "final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ of certiorari." 28 U.S.C. § 1258.

Civ. No. 95-2078 (PG)

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF PUERTO RICO

STARLIGHT SUGAR INC., PAN AMERICAN
GRAIN MANUFACTURING, INC.,
Plaintiffs

v.

NEFTALI SOTO, Individually and as Secretary of the
Department
of Agriculture for the Commonwealth of Puerto Rico,
Defendant

February 14, 2000, Decided

February 14, 2000, Filed

COUNSEL:
For STARLIGHT SUGAR, INC., PAN AMERICAN GRAIN CO., INC., plaintiffs: Antonio Moreda-Toledo, Moreda & Moreda, San Juan, PR.

For STARLIGHT SUGAR, INC., PAN AMERICAN GRAIN CO., INC., plaintiffs: Marcos A. Ramirez-Lavandero, San Juan, PR.

For NEFTALI SOTO, defendant: Pedro J. Durand-Hernandez, DEPARTMENT OF JUSTICE, SAN JUAN, PR.

For MANUEL DIAZ-SALDANA, defendant: John F. Nevares, Smith & Nevares, San Juan, PR.

JUDGES:
JUAN M. PEREZ-GIMENEZ, U.S. District Judge.

OPINIONBY:
JUAN M. PEREZ-GIMENEZ

OPINION:

OPINION & ORDER

Pending before this Court are Plaintiffs', Starlight Sugar, Inc. and Pan American Grain Manufacturing, Inc., Motion for Summary Judgment (Dkt. 121) and Defendant Neftali Soto's Opposition to Plaintiffs' Motion for Summary and Defendant Soto's Motion for Summary Judgment (Dkt. 128). Plaintiffs have alleged Market Regulation No. 13 is unconstitutional under the Interstate Commerce Clause and the Equal Protection Clause of the United States Constitution, and that Defendant Soto is liable to Plaintiffs for his deliberate and willful violation of Plaintiffs' federal constitutional rights as provided for in 42 U.S.C. § 1983. Plaintiffs request injunctive relief and damages.

The Court has previously intimated strongly twice before that Market Regulation No. 13 is unconstitutional, a conclusion affirmed by the First Circuit Court of Appeals. See Garcia v. Bauza Salas, 686 F. Supp. 965 (D.P.R. 1988) (Perez-Gimenez, J.), vacated and rev'd on other grounds, 862 F.2d 905 (1st Cir. 1988); Starlight Sugar, Inc. v Soto, 909 F. Supp. 853 (D.P.R. 1995) (Perez-Gimenez, J.), aff'd, 114 F.3d 330 (1st Cir. 1997) ("Soto I" & "Soto II").

SUMMARY JUDGMENT STANDARD

Summary judgment is "a means of avoiding full-dress trials in unwinnable cases, thereby freeing courts to utilize scarce judicial resources in more beneficial ways." Mesnick v. General Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991), cert. denied, 504 U.S. 985, 119 L. Ed. 2d 586, 112 S. Ct. 2965

(1992). In essence, summary judgment should be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED R. CIV. P. 56(c). See also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Therefore, the trial court must go beyond the facade of the pleadings, and "assay the parties' proof in order to determine whether trial is actually required." Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 794 (1st Cir. 1992), cert. denied, 507 U.S. 1030, 123 L. Ed. 2d 470, 113 S. Ct. 1845 (1993). Throughout the court's analysis, "the entire record [must be seen] in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor." Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990). See also Mullin v. Raytheon Co., 164 F.3d 696, 698 (1st Cir. 1999), reh'g denied by 171 F.3d 710 (1st Cir. 1999), cert. denied U.S. , 120 S. Ct. 44 (1999); Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994).

In order to prevail on a motion for summary judgment, the moving party first must make a preliminary showing that there is no genuine issue of material fact which requires resolution at trial. See Cadle Co. v Hayes, 116 F.3d 957, 960 (1st Cir. 1997). Once the moving party has properly supported it's motion, "the burden shifts to the nonmovant to demonstrate, through specific facts, that a trial worthy issue remains." Id. See also Borschow Hosp. & Med. Supplies, Inc. v. Cesar Castillo, Inc., 96 F.3d 10, 14 (1st Cir. 1996). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). "There must be 'sufficient evidence favoring the nonmoving party for a

jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted.'" Rogers v. Fair, 902 F.2d 140, 143 (1st Cir. 1990) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. at 249-50).

A NOT SO SACCHARINE HISTORY

Plaintiffs are in the business of importing, packing, distributing and selling refined sugar for consumer use or consumption in the Commonwealth of Puerto Rico. At all times relevant to this case, Defendant Neftali Soto was the Secretary of Agriculture and Chairman of the Board of the Sugar Corporation.[1] In 1994, Soto acknowledged that there would be a shortage of refined sugar in Puerto Rico, caused by the shrinkage of the Puerto Rico sugar industry. The announcement was less than surprising; the shrinkage of the sugar industry has been continuous since the late 1950s. In response to the continuing decline, the Board of Directors of the Sugar Corporation authorized the corporation to hold biddings for the importation of packed sugar to satisfy the needs of the local consumers.

Plaintiffs wished to enter the consumer sugar market in Puerto Rico and commenced preparations to import and pack refined sugar in Puerto Rico, including the purchasing of equipment for packing facilities. Subsequently, Plaintiffs brought refined sugar in bulk to Puerto Rico, where they packed it in small bags for direct sale to consumers. The Department of Agriculture never authorized Plaintiffs to import consumer-type sugar into Puerto Rico.

The Department of Agriculture of Puerto Rico served Plaintiffs with a Detention Order on August 11, 1995. The Detention Order called for the detainment of 3,490 bales of refined sugar bagged for direct sale to consumers on the grounds that the sugar was designated for industrial use only and thus in violation of Market Regulation No. 13. The applicable section of Market Regulation No. 13 reads:

"Section No. VI-Containers

> A. Refined sugar to be imported in Puerto Rico shall come in consumer size packages inside the corresponding shipping containers. For the purpose of this Regulation a consumer size package is that one whose net content does not exceed five (5) pounds.
>
> B. Raw sugar, refined sugar for industrial use or sweepings to be imported for marketing and for processing in Puerto Rico, shall come in containers with a capacity up to two hundred (200) pounds only. Imported refined sugar for industrial use shall not be repacked in consumer size packages.

Following the detainment of the bales of sugar, Plaintiffs initiated an action in federal court seeking declaratory judgment, as well as injunctive and damage relief alleging that Market Regulation No. 13 is unconstitutional under the Commerce Clause of the United States Constitution,[2] and that the illegal enforcement of the Regulation caused Plaintiffs substantial economic damages.

Market Regulation No. 13 is not an absolute prohibition on the importation of consumer sugar since it can still be imported in pre-packed two (2) and five (5) pound bags. Also, raw sugar may be imported for refinement. However, the Sugar Corporation owned and operated the only sugar refinery in Puerto Rico. Economic reality precludes the construction of another refinery and also prevents the importation of pre-packed consumer sugar. The Sugar Corporation seemingly maintains a monopoly in sugar refining and consumer sugar sales in Puerto Rico. "As the Acting Executive Director of the Sugar Corporation admitted, Regulation 13 effectively prohibits the importation of table

sugar to the island. Tr. at 142 (Velez Ramos Testimony)." Soto I, 909 F. Supp. at 856. Soto readily admits in his memorandum that "Article VI of Market Regulation No. 13 protects the market for locally grown and refined sugar in the Commonwealth of Puerto Rico. See Tr. at 274-75. The Sugar Corporation cannot compete with other countries that have less expensive manual labor, more fertile lands to be cultivated, better weather conditions, and no laws requiring minimum wages and other benefits for the employees." (Dkt. 128) (Memorandum at 29) Soto goes on to allege that heightened protection is necessary in the sugar industry as opposed to other sectors, such as commerce and manufacturing. Soto concludes that without Market Regulation No. 13 the sugar industry in Puerto Rico will disappear. Id.

Despite the Department of Agriculture's best efforts, not to mention a great deal of money, Market Regulation No. 13 has not stopped the deterioration of the sugar industry in Puerto Rico; the number of persons employed in the industry and the amount of land devoted to sugar production has declined significantly. See Soto I, 909 F. Supp. at 855 n.2; Tr. at 162-66 (Velez Ramos Testimony).

MORE SWEET TALK

## I. PUERTO RICO SUGAR AND THE UNITED STATES CONSTITUTION

### A. COMMERCE CLAUSE DISCUSSION

The Department of Agriculture is no stranger to constitutional challenges to their regulations. This Court has previously concluded that this precise section of Market Regulation No. 13 is unconstitutional, a finding upheld on appeal. See Garcia v. Bauza Salas, 686 F. Supp. at 973-74; Soto I, 909 F. Supp. at 861; Starlight Sugar, Inc. v. Soto, 114 F.3d at 331-32 ("Soto II"). Department of Agriculture regulations concerning both pigeon peas and eggs have also

been determined to violate the dormant Commerce Clause. See Goya de Puerto Rico Inc. v. Santiago, 59 F. Supp. 2d 274, 276-78 (D.P.R. 1999) (Cerezo, J.) (holding several Department of Agriculture sections within a regulation regulating, among other things, pigeon peas, unconstitutional under the Dormant Commerce Clause); United Egg Producers v. Department of Agriculture, 77 F.3d 567, 571-72 (1st Cir. 1996), aff'g, 871 F. Supp. 106 (D.P.R. 1994) (Perez-Gimenez, J.) (holding Market Regulation No. 3 § X(F) unconstitutional under the Dormant Commerce Clause). See also United Egg Producers, et al. v. Davila, et al., 2000 U.S. Dist. LEXIS 3650, No. 92-1924 (D.P.R. Feb. 4, 2000) (mooting constitutional challenge when Department of Agriculture changed regulation to comply with constitutional requirements). Suffice to say, the Court has not suddenly changed its mind: Section Six of Market Regulation No. 13 remains unconstitutional.[3]

B. EQUAL PROTECTION CLAUSE

Plaintiffs have also alleged that Market Regulation No. 13 violates the Equal Protection Clause of the United States Constitution. Generally, "courts will uphold economic and social legislation that distinguishes between two similarly situated groups as long as the classification is rationally related to a legitimate government objective." Fireside Nissan, Inc. v. Fanning, 30 F.3d 206, 219 (1st Cir. 1994) (citing Nordlinger v. Hahn, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992); Schweiker v. Wilson, 450 U.S. 221, 230, 67 L. Ed. 2d 186, 101 S. Ct. 1074 (1980); Dandridge v. Williams, 397 U.S. 471, 485, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970); LCM Enterps., Inc. v. Town of Dartmouth, 14 F.3d 675, 678-79 (1st Cir. 1994)). Defendant contends that Market Regulation No. 13 has five (5) legitimate objectives, all are strikingly similar to Defendant's justifications under the Commerce Clause portion of this suit: (1) to sponsor the Department of Agriculture's "public policy of land banks"[4];

(2) to sponsor the Sugar Corporation; (3) to contribute to the local economy[5]; (4) to maintain 13,000 jobs of unskilled labor[6]; and (5) to make sure that the sugar sold directly to consumers meets minimum quality requirements.[7] These so-called objectives are no more than excuses for economic protectionism.

> Equal protection restraints are applicable even though the effect of the discrimination in this case is similar to the type of burden with which the Commerce Clause also would be concerned. We reaffirmed the importance of the Equal Protection Clause in the insurance context in Western & Southern and see no reason now for reassessing that view.
>
> In whatever light the State's position is cast, acceptance of its contention that promotion of domestic industry is always a legitimate state purpose under equal protection analysis would eviscerate the Equal Protection Clause in this context. A State's natural inclination frequently would be to prefer domestic business over foreign .... We hold that under the circumstances of this case, promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose.

Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 881-82, 84 L. Ed. 2d 751, 105 S. Ct. 1676 (1985). Market Regulation No. 13 violates the Equal Protection Clause of the United States Constitution.

## II SECTION 1983 CLAIM-HOW SWEET IS IT

More is needed in order to recover under 42 U.S.C. § 1983 than the reaffirmation that Market Regulation No. 13 is unconstitutional. Plaintiffs must allege and prove that (1) Defendant's conduct occurred under the color of state law and (2) the conduct deprived Plaintiffs of a right, privilege or immunity secured to them federal law or the United States Constitution. The Supreme Court has adopted a broad construction of § 1983 in order to "provide a remedy . . . against all forms of official violation of federally protected rights." Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658, 700-01, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). See also Dennis v. Higgins, 498 U.S. 439, 443-45, 112 L. Ed. 2d 969, 111 S. Ct. 865 (1990). The Commerce Clause has been held to provide a § 1983 cause of action. See, e.g., Dennis v. Higgins, 498 U.S. at 451.

### A. INJUNCTIVE RELIEF

State officials sued in their official capacities for damages or other retroactive relief are not "persons" for purposes of § 1983. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 70, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989). However, a suit against a state official in their official capacity for injunctive or prospective relief is permitted. In affirming this Court's previous decision granting Plaintiffs injunctive relief, the First Circuit wrote:

> Commerce Clause case law strongly supports the position of plaintiff sugar importers. The Department of Agriculture asks that the dormant Commerce Clause put forward in Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 [] (1970), be applied to Section Six [of Market Regulation No. 13], and it seems to acknowledge that for Pike to apply, it must characterize Section Six

as an even handed regulation that imposes only an incidental burden on interstate commerce. Section Six is plainly not such a creature. As the district court properly found, where a state law or regulation, such as Section Six, facially discriminates against interstate commerce, and has as its very purpose the protection of local economic interests, it must withstand the most stringent form of scrutiny under the Commerce Clause. See, e.g., West Lynn Creamery v. Healy, 512 U.S. 186, 129 L. Ed. 2d 157, 114 S. Ct. 2205, 2211-13 (1994). Under such strict scrutiny, facially discriminatory regulations are presumptively invalid and are "routinely struck down," unless it can be shown that they serve a legitimate local interest "unrelated to economic protectionism" -- an interest, furthermore, that cannot be served through non-discriminatory means. New Energy Co. v. Limbach, 486 U.S. 269, 274, 100 L. Ed. 2d 302, 108 S. Ct. 1803 (1988); see also Maine v. Taylor, 477 U.S. 131, 138, 91 L. Ed. 2d 110, 106 S. Ct. 2440 (1986) (upholding facially discriminatory import restriction as necessary to protect in-state wildlife). Here, appellants can only justify their restriction of bulk sugar importation and subsequent packaging for consumer sale by listing the various local benefits attendant to economic protectionism itself. "Where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." City of Philadelphia v. New Jersey, 437 U.S. 617, 624, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978).

Soto II, 114 F.3d at 331-32. Defendant maintained the same arguments throughout this case and the Court sees no reason to change from its previous view. Therefore, the Court GRANTS Plaintiffs Motion for Summary Judgment as to injunctive relief claim against Defendant Soto in his official capacity.

B. DAMAGES

Plaintiffs have also alleged a damage suit against Soto in his "personal" capacity. State officials sued in their personal capacities are subject to a suit for damages under § 1983. See Hafer v. Melo, 502 U.S. 21, 25-26, 116 L. Ed. 2d 301, 112 S. Ct. 358 (1991). In order to establish a § 1983 claim against a state official acting in his personal capacity, "it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." Hafer v. Melo, 502 U.S. at 25 (quoting Kentucky v. Graham, 473 U.S. 159, 166, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985)).

Defendant has the burden of pleading qualified immunity. See Gomez v. Toledo, 446 U.S. 635, 641, 64 L. Ed. 2d 572, 100 S. Ct. 1920 (1980); Harlow v. Fitzgerald, 457 U.S. 800, 815 n.24, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). Once a defendant raises a qualified immunity defense, the burden shifts to the plaintiff to demonstrate that the defendant's actions violated a clearly established constitutional right. See Guffey v. Wyatt, 18 F.3d 869, 871 (10th Cir. 1994). See also Siegert v. Gilley, 500 U.S. 226, 232, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991). Although Defendant claims he is entitled to a qualified immunity under the Eleventh Amendment, the Eleventh Amendment does not bar awarding damages against state officials who are sued in their personal capacities under § 1983. See Hafer v. Melo, 502 U.S. at 25. Rather, Soto bases his claim for qualified immunity upon the objective standard stated in Harlow v. Fitzgerald, asserting that he is immune because at all times relevant he objectively acted reasonably. See Hafer v. Melo, 502 U.S. at 25.

Harlow establishes a two-part test for determining qualified immunity. First, the Court must decide if the law was clearly established at the time the action occurred. See Harlow v. Fitzgerald, 457 U.S. at 818. If the first part of the test is satisfied, Defendant must demonstrate that (due to extraordinary circumstances) he did not know, nor reasonably should have known, of the relevant standards. Both parts are objective, though the second part is determined based upon the "objective reasonableness" of Defendant. The Court then inquires: would a reasonable official conclude that seizing Plaintiffs' sugar and discriminating against interstate commerce violates the dormant Commerce Clause?

"On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." Harlow v. Fitzgerald, 457 U.S. at 818. The grant or denial of qualified immunity is thus a question of law for the court. Elder v. Holloway, 510 U.S. 510, 515, 127 L. Ed. 2d 344, 114 S. Ct. 1019 (1994).

The Court holds that the law was clearly established at the time the conduct occurred and that Soto knew or should have known that such conduct violated the Commerce Clause. Such a holding places a negligible burden on a state official. The Commerce Clause is a cornerstone of our economy and our country. It helps ensure that persons maintain their freedom to trade. The Court is hard pressed to believe that Soto, an attorney, would be unaware of the existence of the Commerce Clause. Indeed, a memorandum prepared for Soto questioned the constitutionality of Market Regulation No. 13 as early as 1993.[8] (Dkt. 121, exh. II of Statement of Material Uncontroverted Facts) Defendant is not entitled to either a blanket or qualified immunity under the facts of this case as Soto knew or should have known that

Market Regulation No. 13 violates the dormant Commerce Clause.[9]

In order to be found to be acting under state law, a state official must have exercised power provided by state law and occurred only because of the authority given to the state official under his state law authority. See United States v. Classic, 313 U.S. 299, 326, 85 L. Ed. 1368, 61 S. Ct. 1031 (1941), reh'g denied, 314 U.S. 707, 86 L. Ed. 565, 62 S. Ct. 51 (1941). "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under the color of' state law." United States v. Classic, 313 U.S. 299. 326, 85 L. Ed. 1368, 61 S. Ct. 1031 (1941). "The dispositive issue is whether the official was acting pursuant to the power he/she possessed by state authority or acting only as a private individual." Edwards v. Wallace Community Coll., 49 F.3d 1517, 1523 (11th Cir. 1995). Here, Soto unquestionably acted "under the color of [Puerto Rico] law."

"The [Supreme] Court has often described the Commerce Clause as conferring a 'right' to engage in interstate trade free from restrictive state regulation." Dennis v. Higgins, 498 U.S. at 448. Plaintiffs were not allowed to compete against the Sugar Corporation, due directly to "restrictive state regulation." Plaintiffs satisfied both elements of a § 1983 claim.

This is not to say that Plaintiffs can automatically recover damages. A purpose of § 1983 is to compensate plaintiffs who have been deprived of constitutionally guaranteed rights, when those deprivations cause "compensable injury." See Carey v. Piphus, 435 U.S. 247, 255, 55 L. Ed. 2d 252, 98 S. Ct. 1042 (1978). If Plaintiffs cannot prove actual injury, they can recover only nominal damages. See Carey v. Piphus, 435 U.S. at 266-67. Plaintiffs should therefore be prepared to present specific evidence of damages, e.g., lost income, etc. 4 ROTUNDA & NOWAK, TREATISE ON

CONSTITUTIONAL LAW-SUBSTANCE AND PROCEDURE § 19.33, at 129 (3d ed. 1999).

CONCLUSION

The Court is shocked by the lack of understanding on the part of Defendant. In what seems like a most basic component of this country, Defendant has failed to recognize its importance. If the sugar industry fails it is because it cannot compete. While unfortunate, this may be the reality that Defendant must face.

Defendant's memorandum reads more like a emotional plea than a legal argument. Defendant's cries fall on deaf ears. The Court refuses to turn its back on the free market system. Defendant has indeed made the Court's decision very easy, time and time again openly admitting that the purpose behind Market Regulation No. 13 is to economically protect the lone sugar producer in Puerto Rico. To make clear so Defendant once and for all understands that Market Regulation No. 13 is unconstitutional: A state, which includes Puerto Rico, cannot economically protect local industry without a valid non-economic justification. This is anti-competitive and violates the dormant Commerce Clause of the United States Constitution.

Wherefore, the Court GRANTS Plaintiffs' Motion for Summary Judgment, GRANTING Plaintiffs a permanent injunction barring the enforcement of Section Six of Market Regulation No. 13, and DENIES Defendant's Motion for Summary Judgment. Plaintiffs are hereby ordered to file a motion requesting damages, along with an accompanying brief on the issue of monetary damages in a § 1983 claim against an official in his personal capacity, no later than March 31, 2000. Defendant's response is due 15 days following Plaintiffs' filing.

IT IS SO ORDERED.

San Juan, Puerto Rico, February 14, 2000.

JUAN M. PEREZ-GIMENEZ

U.S. District Judge

FOOTNOTES

[1] The Sugar Corporation is a public corporation but with a separate and distinct legal personality apart from the Government of Puerto Rico. The Sugar Corporation arranges the refinement and distribution of Puerto Rico-produced sugar to the island's consumers.

[2] Plaintiffs also alleged that Market Regulation No. 13 violates the Equal Protection Clause of the United States Constitution. Whereas the purpose of the dormant Commerce Clause is to protect "interstate commerce" from unconstitutional discrimination by the states, the purpose of the equal protection clause is to protect "persons" from unconstitutional discrimination by the states. Here, interstate commerce is at issue, which provides the basis for both the dormant commerce clause claim as well as the equal protection clause claim.

[3] See the Court's previous opinion, 909 F. Supp. 853, and the First Circuit affirmation of that opinion, 114 F.3d 330.

[4] See Defendant's Motion for Summary Judgment (Dkt. 128) The Court understands Defendant's use of the term "land bank" to mean the Department's policy of setting aside future use of land for certain purposes.

[5] If the Department of Agriculture truly wants to "sponsor" the Sugar Corporation and contribute to the local economy, economic protectionism is above and beyond that goal. The simple influx of capital satisfies both these objectives.

[6] It has been suggested that perhaps the Department can re-route some of that money for providing education to the 13,000 unskilled laborers instead of sinking more money into the declining Sugar industry. See Garcia v. Bauza Salas, 686 F. Supp. at 974-77.

[7] It seems that the Puerto Rico Department of Health, not the Department of Agriculture, is the agency entrusted with overseeing this type of concern. It is the Department of Health, not the Department of Agriculture that inspects the sugar and issues licenses for the importation of sugar. Quality of sugar and Market Regulation No. 13 are inapposite terms. See Soto I, 909 F. Supp. at 860.

[8] An opinion and order issued by this Court in 1988 also held Market Regulation No. 13 unconstitutional. See Garcia v. Bauza Salas, 686 F. Supp. at 973-74. Market Regulation No. 13 is exactly what Defendant stated it is, a regulation that operates by design to exclude sugar produced outside of Puerto Rico to protect local producers.

[9] A similar result is found when analyzing the Equal Protection Clause, and either constitutional right leads to the same conclusion-Soto knew or should have known that his actions would violate Plaintiffs' constitutional rights.

No. 96-1332

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

STARLIGHT SUGAR, INC., ET AL.,
Plaintiffs - Appellees,

v.

NEFTALI SOTO, INDIVIDUALLY AND AS SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF THE COMMONWEALTH OF PUERTO RICO,
Defendant - Appellant.

May 30, 1997, Decided

COUNSEL:
Edgardo Rodriguez-Quilichini, Assistant Solicitor General, Department of Justice, with whom Carlos Lugo-Fiol, Solicitor General, and Edda Serrano-Blasini, Deputy Solicitor General, were on brief for appellant.

Marcos A. Ramirez-Lavandero, with whom Eduardo A. Vera-Ramirez, Janice M. Gutierrez-Lacourt and Marcos A. Ramirez Lavandero & Associates were on brief for appellees.

JUDGES:
Before Torruella, Chief Judge, Coffin, Senior Circuit Judge, and Stahl, Circuit Judge.

OPINIONBY:
TORRUELLA

OPINION:

TORRUELLA, Chief Judge. The Department of Agriculture of the Commonwealth of Puerto Rico urges us to vacate a preliminary injunction issued on December 21, 1995 that bars the enforcement of Section Six of its Market Regulation 13.[1] Section Six prohibits the importation into Puerto Rico of refined sugar intended for consumer sale that is not prepackaged in units of five pounds or less. The district court held that the regulation violated the Commerce Clause in its "dormant" state and the Equal Protection Clause and also found that the plaintiff sugar importers had met all of the grounds for preliminary injunctive relief.

Under our four-part test for determining whether the grant or denial of preliminary injunctive relief is appropriate, the district court must consider:

> (1) the likelihood of success on the merits; (2) the potential for irreparable harm if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest.

Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 15 (1st Cir. 1996). On appeal, the standard of review is deferential, and we have said that "unless the appellant can show that the lower court misapprehended the law or committed a palpable abuse of discretion, the court of appeals will not intervene." Id. at 16.

Upon careful consideration of the briefs, arguments of counsel, and the record in this case, we find no abuse of discretion and no error of law, and therefore affirm in light of

the sound reasons provided in the district court's thorough opinion. See Starlight Sugar, Inc. v. Soto, 909 F. Supp. 853 (D.P.R. 1995).

We only note the following. With respect to the likelihood of success on the merits, Commerce Clause caselaw strongly supports the position of the plaintiff sugar importers. The Department of Agriculture asks that the dormant Commerce Clause balancing test put forward in Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970), be applied to Section Six, and it seems to acknowledge that for Pike to apply, it must characterize Section Six as an evenhanded regulation that imposes only an incidental burden on interstate commerce. Section Six is plainly not such a creature. As the district court properly found, where a state law or regulation, such as Section Six, facially discriminates against interstate commerce, and has as its very purpose the protection of local economic interests, it must withstand the most stringent form of scrutiny under the Commerce Clause. See, e.g., West Lynn Creamery v. Healy, 512 U.S. 186, 129 L. Ed. 2d 157, 114 S. Ct. 2205, 2211-13 (1994). Under such strict scrutiny, facially discriminatory regulations are presumptively invalid and are "routinely struck down," unless it can be shown that they serve a legitimate local interest "unrelated to economic protectionism" -- an interest, furthermore, that cannot be served through non-discriminatory means. New Energy Co. v. Limbach, 486 U.S. 269, 274, 100 L. Ed. 2d 302, 108 S. Ct. 1803 (1988); see also Maine v. Taylor, 477 U.S. 131, 138, 91 L. Ed. 2d 110, 106 S. Ct. 2440 (1986) (upholding facially discriminatory import restriction as necessary to protect in-state wildlife). Here, appellants can only justify their restriction of bulk sugar importation and subsequent packaging for consumer sale by listing the various local benefits attendant to economic protectionism itself.[2] "Where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been

erected." City of Philadelphia v. New Jersey, 437 U.S. 617, 624, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978).

The district court also did not abuse its discretion in finding the potential for irreparable harm. See 909 F. Supp. at 861-62. The district court found that irreparable harm was threatened by the inability of the plaintiff sugar importers to take advantage of an impending shortage of sugar supply in Puerto Rico. The Department of Agriculture argues that a potential harm cannot be deemed "irreparable" if it is of a kind that can be later compensated through money damages. While it is true that injunctive relief is generally inappropriate where money damages can make a plaintiff whole, we have recognized that the loss of a unique or fleeting business opportunity can constitute irreparable injury. See Hyde Park Partners v. Connolly, 839 F.2d 837, 853 (1st Cir. 1988) (injunction may be appropriate where timing, in tender offer context, is crucial); see also Baccarat, 102 F.3d at 18-19 ("[A] plaintiff need not demonstrate that the denial of injunctive relief will be fatal to its business. . . . If [it] suffers a substantial injury that is not accurately measurable or adequately compensable by money damages, irreparable harm is a natural sequel.") (citations omitted) (emphasis added). The concern in the present situation is clear: although we remain in the domain of economic profit or loss, a context in which compensation through legal remedies is preferred, as a practical matter the potential value of an evanescent business opportunity may be extremely difficult to measure, after the fact. The district court did not abuse its discretion, therefore, in finding that plaintiffs were threatened with irreparable harm through the ongoing enforcement of Section Six.

Affirmed.

FOOTNOTES

[1] Section VI of Regulation 13 of the Puerto Rico Department of Agriculture provides in pertinent part:

> A. Refined sugar to be imported in Puerto Rico shall come in consumer size packages inside the corresponding shipping containers. For the purposes of this Regulation a consumer size package is one whose net content does not exceed five (5) pounds.
>
> B. . . . Imported refined sugar for industrial use shall not be repacked in consumer-size packages for direct sales to the consumers.

[2] Appellants concede that Section Six has provided a competitive advantage to the Puerto Rico sugar corporation, which owns the only existing refinery in Puerto Rico. In support of Section Six, appellants cite such local interests as the protection of jobs in the Puerto Rico sugar industry, the preservation of rural culture associated with sugar production, and the prevention of certain demographic changes (the movement of unemployed sugar workers from rural areas to urban areas) that may result were unfettered interstate competition allowed.

Civil No. 95-2078 (PG)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

STARLIGHT SUGAR INC., PAN AMERICAN GRAIN MFG. CO., INC,
Plaintiffs

v.

NEFTALI SOTO, INDIVIDUALLY AND AS SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF THE COMMONWEALTH OF PUERTO RICO,
Defendant

December 21, 1995, Decided

December 21, 1995, Filed

COUNSEL:
For Plaintiffs: Antonio Moreda, Esq., San Juan, P. R. Marcos A. Ramirez, Esq., Old San Juan, P.R.

For Defendant: Anita Hill-Adames, Esq., Federal Litigation Division, Dept. of Justice, San Juan, P.R.

JUDGES:
JUAN M. PEREZ-GIMENEZ, U. S. District Judge

OPINIONBY:
JUAN M. PEREZ-GIMENEZ

OPINION:

OPINION AND ORDER

Through the random operation of our district's case assignment system, this is the second time in seven years that this Court has presided over a constitutional challenge to Puerto Rico's government-operated sugar industry. See Garcia v. Bauza Salas, 686 F. Supp. 965 (D.P.R.), rev'd on other grounds, 862 F.2d 905 (1st Cir. 1988).[1] In Bauza Salas, the Court found that the Puerto Rico Department of Agriculture's ("the Department's") Market Regulation 13, which limits the importation of sugar to Puerto Rico, violated the Commerce Clause "in its dormant state," Art. I, § 8, cl. 3, of the United States Constitution. Id. at 973.

The same regulation is challenged in this case, and the Court reaches the same conclusion it did seven years ago. Regulation 13 imposes unconstitutional restrictions on inter-state commerce. Moreover, Regulation 13 is not rationally related to a legitimate government objective and, therefore, violates the equal protection guarantees of the Fourteenth Amendment. Accordingly, plaintiff's request for injunctive relief from the Secretary's enforcement of Regulation 13 is GRANTED.

I. Background

Like cotton in the southern United States, sugar occupies a unique place in the cultural and economic history of Puerto Rico From the late 1800s through the 19405, sugar cane was far and away the most important agricultural commodity produced on the Island. Raymond Carr, Puerto Rico: A Colonial Experiment 222. The industry's political influence was even greater, as "King Sugar" exerted a disproportionate influence on the United States' early governance of Puerto Rico. Arturo Morales Carrion, Puerto Rico: A Political and Cultural History 137-38, 174. Further, much of the island's rural heritage is closely linked to life in the sugar cane fields.

For the past forty years, however, the sugar industry has been in a continual state of decline.[2] By the early 1970s, private industry had abandoned sugar production in Puerto Rico altogether because it was no longer profitable. Bauza Salas, 686 F. Supp. at 974 (appendix). In 1973, the Commonwealth government established the Sugar Corporation of Puerto Rico to fill the void left by the flight of private industry.[3]

Despite the Puerto Rico government's direct subsidization of the industry, sugar cane production on the island has continued to decline. In 1973, approximately 150,000 acres of land were devoted to sugar production, and 12 to 14 sugar mills were in operation on the island. Transcript at 162 (Velez Ramos Testimony); see also footnote 2. By 1988, only 50,000 acres were devoted to sugar production. Bauza Salas, 686 F. Supp. at 974. This figure has declined to 25,000 acres today, with only three mills remaining in operation. Further, whereas the industry employed some 14,000 workers in 1988, it now only employs between 8,000-10,000 persons.[4] Transcript at 163-66 (Velez Ramos Testimony).

This history provides the context for the Department's amendment in 1984 of Regulation 13. See Bauza' Salas, 686 F. Supp. at 966, 972-73. The amended regulation restricts the importation of refined sugar by prohibiting the repackaging of bulk shipments into two and five pound bags (hereafter referred to as "table sugar") for subsequent direct sale to Puerto Rico's consumers. Specifically, section 6 of Market Regulation 13 provides, in pertinent part:

> A. Refined sugar to be imported in Puerto Rico shall come in consumer size packages inside the corresponding shipping containers. For the purposes of this Regulation a consumer size package is that one whose net content does not exceed five (5) pounds.

> B. . . . Imported refined sugar for industrial use shall not be repacked in consumer-size packages for direct sales to the consumers.

Regulation 13 is, concededly, not an absolute prohibition on the importation of table sugar. Theoretically, sugar could still be imported pre-packed in two and five pound bags. However, such importation is not economically feasible. Transcript at 233-36 (Lopez Gomez Testimony). Also, bulk raw sugar could be imported for subsequent refinement. However, the Sugar Corporation owns and operates the only sugar refinery in Puerto Rico, and economic considerations make it unlikely that a new refinery could be built to process imported raw sugar. As the Acting Executive Director of the Sugar Corporation admitted, Regulation 13 effectively prohibits the importation of table sugar to the Island. Transcript at 142 (Velez Ramos Testimony).

The events precipitating the instant challenge occurred in the fall of 1994, when the government forecasted an impending shortage of Puerto Rico-produced sugar. The Department solicited bids from private industry to help make-up the deficit. Transcript at 240-42 (Defendant Soto's Testimony). The subsequent events are disputed by the parties, but are frankly not germane to the question before the Court. Suffice it to say that co-plaintiff Pan American Grain imported approximately 80 thousand pounds of sugar so that its wholly-owned subsidiary, co-plaintiff Starlight Sugar, could repackage it for consumer sales. The government emphatically denies ever seriously considering granting plaintiffs a waiver to Regulation 13. Id.

After media coverage of plaintiffs' intention to sell table sugar to grocery stores on the Island, the Department issued an administrative detention order, pursuant to Regulation 13, prohibiting plaintiffs from doing so. Plaintiffs subsequently initiated this litigation. They seek declaratory and injunctive

relief, asserting the constitutional invalidity of Regulation 13. In addition to the Commerce Clause challenge, plaintiffs allege that the Regulation violates the Equal Protection clause of the U.S. Constitution.[5] From September 27, 1995 until October 10, 1995, the Court held a hearing to consider the plaintiffs' contention that Regulation 13 should be declared invalid, and that continued enforcement of it should be enjoined.

II. Jurisdictional Prerequisites

The Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1331 and § 1343. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b). Plaintiffs seek relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2201 and § 2202.

In passing, the Court notes that a large portion of plaintiffs' brief is devoted to arguing why the Court should not abstain from deciding this case. Plaintiff undoubtedly anticipated that the Secretary would urge abstention. However, he has not done so. (The Court ordered simultaneous briefings so the parties had to anticipate each other's arguments.) Therefore, there is no reason on the record why the Court should abstain from considering and resolving the issues before it.

III. Discussion

The standard for granting a preliminary injunction is well-known. A district court must undertake a four-part analysis that takes into account the following considerations: (1) the movant's likelihood of success on the merits, (2) the potential for irreparable injury, (3) a balancing of the relevant equities, and (4) the effect on the public interest. Sunshine Development, Inc. v. F.D.I.C., 33 F.3d 106, 110 (1st Cir. 1994). Of these four factors, the probability of success component is regarded by the First Circuit "as critical in

determining the propriety of injunctive relief." Lancor v. Lebanon Housing Authority, 760 F.2d 361, 362 (1985).

a. Likelihood of Success on the Merits[6]

1. The Commerce Clause Challenge

i. Governing Law

Supreme Court doctrine holds that the negative implications of Congress' power to regulate interstate commerce under the Commerce Clause implicitly limits the power of the states. West Lynn Creamery, Inc. v. Healy, 129 L. Ed. 2d 157, U.S. , 114 S. Ct. 2205, 2211 (1994). The Court has characterized its dormant commerce clause jurisprudence as follows:

> This "negative" aspect of the Commerce Clause prohibits economic protectionism -- that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. . . . Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.

West Lynn Creamery, Inc., 114 S. Ct. at 2211 (quoting New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-74, 100 L. Ed. 2d 302, 108 S. Ct. 1803 (1988)). The constraints of the dormant Commerce Clause apply equally to Puerto Rico. Trailer Marine Transport Corp. v. Rivera Vazquez, 977 F.2d 1, 8 (1st Cir. 1992) (noting that "full economic integration is as important to Puerto Rico as to any state in the Union") (emphasis added).

The Court has adopted a "two-tiered approach to analyzing state economic regulation under the Commerce Clause." Healy v. Beer Institute, 491 U.S. 324, 337 n.14, 105 L. Ed. 2d 275, 109 S. Ct. 2491 (1989). Under this approach, courts must first determine if a state's regulation discriminates on its face by giving economic protection to in-state entities at the expense of out-of-state entities. If so, the statute is deemed per se invalid, justifiable only by a compelling state interest. City of Philadelphia v. New Jersey, 437 U.S. 617, 623-24, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978).

If the statute is not facially discriminatory, the Court will proceed to the second tier and balance the incidental burdens imposed on interstate commerce against the benefits to local interests. Beer Institute, 491 U.S. at 337 n.14. See Pike v. Bruce Church, Inc., 397 U.S. 137, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970). This aspect of the analysis, often called the "Pike test," has been characterized by the Court as a "more flexible approach." City of Philadelphia, 437 U.S. 617, 624, 57 L. Ed. 2d 475, 98 S. Ct. 2531.

The Supreme Court recognizes that "incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." Id. at 623-24. Thus, in Maine v. Taylor, 477 U.S. 131, 91 L. Ed. 2d 110, 106 S. Ct. 2440 (1986), the Court upheld Maine's ban on the import of baitfish, despite substantial evidence of the ban's discriminatory purpose. The Court accepted the state's argument that such a ban was the most efficient means to safeguard native fish species from parasites not found in Maine waters.

Health and safety justifications are nonetheless subjected to close scrutiny. Thus, in Dean Milk Co. v. Madison, 340 U.S. 349, 95 L. Ed. 329, 71 S. Ct. 295 (1951), a case with facts similar to our own, the Court invalidated a city ordinance that made it unlawful to sell any milk that had not

been processed and bottled within five miles of the city. The Court held that even a barrier to out of state goods that is motivated by bona fide safety or health concerns will be struck down on Commerce Clause grounds if reasonable non-discriminatory alternatives are available.

Although the legitimacy of a state's asserted justification for discriminatory regulation must be evaluated on a "case-by-case analysis of purposes and effects," West Lynn Creamery, 114 S. Ct. at 2215, the Court has made clear that the promotion of in-state business by discriminating against non resident competitors "is not a legitimate state purpose." Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, 880, 84 L. Ed. 2d 751, 105 S. Ct. 1676 (1985) (holding in the context of Equal Protection Clause analysis). Similarly, the Court has held that parochial environmental and land preservation concerns will not justify measures that discriminate against interstate commerce. West Lynn Creamery, 114 S. Ct. at 2218 n.20.

ii. Application of Commerce Clause Jurisprudence

Regulation 13 operates to burden interstate commerce in at least two distinct ways. First, by prohibiting the importation of bulk refined sugar for subsequent repackaging, Regulation 13 operates as an "importation restriction" of the sort that has routinely been struck down by the Supreme Court. See Ronald D. Rotunda and John E. Nowak, 2 Treatise on Constitutional Law: Substance and Procedure, 2nd, § 11.8 at 25-38.

The second effect is a corollary of the first. Since the only way to enter the table sugar market is to import raw sugar and refine it in Puerto Rico, Regulation 13 "is just one more instance of local processing requirements that we have long held invalid." C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 128 L. Ed. 2d 399, U.S. , 114 S. Ct. 1677, 1682 (1994). After an instructive string cite, C & A Carbone explains that "the essential vice in laws of this sort is that

they bar the import of the processing service. Out-of-state meat inspectors, or shrimp hullers, or milk pasteurizers [or sugar refiners] are deprived of access to local demand for their services." Id. at 1683.

The Secretary does not dispute that Regulation 13 has these effects. In defense, he asserts that (1) Regulation 13 is non-discriminatory, thereby requiring application of the "more flexible" Pike test, and (2) the benefits accruing from the Regulation outweigh the burden it places on interstate commerce.

At the outset the Court must address the threshold question of whether Regulation 13 is discriminatory. The Secretary's argument is briefly stated in one paragraph, see Commonwealth Brief at 17, and its brevity has obscured its logic. Two interpretations are possible: (1) that Regulation 13 does not violate the dormant Commerce Clause because plaintiffs are Puerto Rico residents, and, therefore, essentially lack standing to claim the doctrine's protection; or (2) that Regulation 13 is non-discriminatory because it applies equally to all businesses, whether they are residents of the Commonwealth or not.

Whichever argument is intended, neither is persuasive. Plaintiffs seek to import and sell sugar that is cultivated and refined outside of Puerto Rico. Regulation 13 prevents the plaintiffs from doing so because of the very fact of the sugar's non-Puerto Rico origins. Thus, the Regulation discriminates between Puerto Rico and non-Puerto Rico sugar in a manner that is fatal for would-be importers of the latter.

To argue that Regulation 13 non-discriminatory because it "neutrally" limits the prospects of both in-state-importers and out-of-state importers -- neither may import non-Puerto Rico produced sugar -- is to misconstrue the policy of the dormant commerce clause. The doctrine is not aimed simply at protecting "out-of-staters" in the manner, for example, of the federal courts' diversity jurisdiction. Rather, it is designed

to "foster economic integration and prevent local interference with the flow of the nation's commerce." Trailer Marine, 977 F.2d at 8. The doctrine protects and advances the interests of all of the citizens of the United States, not just the parties in a particular dispute. See H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539, 93 L. Ed. 865, 69 S. Ct. 657 (1949) ("every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any").

Regulation 13 effectively denies Puerto Rican consumers access to sugar produced outside the Commonwealth. This is not the ancillary effect of some legitimate state objective, but rather the regulation's avowed purpose. See discussion pages 14-16. Thus, simply because plaintiffs are Puerto Rico entities does not diminish their right to bring this suit.[7] See, e.g., West Lynn Creamery, supra (Massachusetts entities successfully challenged a Massachusetts regulation that burdened the importation of milk produced outside of Massachusetts).

Thus, Regulation 13, on its face, discriminates against interstate commerce.[8] The regulation is, therefore, "per se invalid," unless the Secretary "can demonstrate, under rigorous scrutiny, that [Puerto Rico] has no other means to advance a legitimate local interest." C & A Carbone, 114 S. Ct. at 1683.

The Secretary advances a number of justifications for the regulation. One justification that is conspicuous by its absence, however, is any serious contention that Regulation 13 advances important health and safety interests. As a matter of litigation strategy, the omission is curious, since as noted above, the few facially discriminatory regulations that have survived commerce clause scrutiny have all involved such claims. Further, the talismanic "health and safety" argument was the principle justification advanced by the government in the 1988 litigation. Bauza Salas, 686 F. Supp. 965, 972-74.

Of course, the fact that the argument is unsustainable might be one reason the Secretary chose not to make it. As noted eight years ago, prior to the promulgation of the section of Regulation 13 challenged here, sugar was regularly imported in bulk and repackaged in consumer-sized packages, without any "complaints, that we know of, as to the quality of [the] sugar." Id. at 972. It was also pointed out that there were measures less burdensome on inter-state commerce, besides the repackaging prohibition, that could be implemented to further the Department's "wholesomeness" concerns. Id. at 973-74. See Dean Milk, supra.

Evidence adduced during the preliminary injunction hearing this time around further illuminates the hollowness of the "health and safety" argument. It is true that section V of Regulation 13 establishes minimum quality standards for sugar brought into Puerto Rico. It was established at the hearing, however, that the Department conducts no "wholesomeness" inspections of sugar whatsoever. Those inspections that are done are undertaken by the Puerto Rico Department of Health pursuant to the Department of Health's own regulations, and it is the Department of Health -- not the Department of Agriculture -- that issues licenses for the importation of sugar to Puerto Rico. See Transcript at 42-51 (Pico Seda Testimony); Transcript at 304-306 (Gonzalez Freyre Testimony).

Thus, as implemented by the Department, Regulation 13 has little or nothing to do with the quality of sugar. The Secretary conceded this when he answered "Yes" to the following question posed by plaintiff's counsel: "Isn't it a fact that the most important purpose of . . . regulation [13] is to protect the Sugar Corporation from competition?" Transcript at 242-43. Elsewhere, the secretary stated that Regulation 13 "protect[s] the market of two and five pound packaging that has . . . traditionally [belonged to] the Sugar Corporation."

Transcript at 278. Ending the regulation's protection of the sugar industry, the Secretary asserted, "would be equivalent to the death of the sugar industry in Puerto Rico." Id. He cited Puerto Rico's relatively high production costs, and the better growing conditions of other sugar producers, as the basis for his lack of optimism. Transcript at 279-80.

Thus, the Secretary admitted that Regulation 13 operates by design to exclude sugar produced outside Puerto Rico in order to protect an industry that could not otherwise survive. Nonetheless, the Secretary asserts that Regulation 13 "does not amount to simple economic protectionism." Secretary's Brief at 10. To support this contention the Secretary cites the many benefits which flow from the Commonwealth's protection of the sugar industry. These include: (1) protection of Puerto Rico's second largest agricultural industry; (2) "8 to 12,000" jobs; (3) maintenance of the land, investment and income devoted to and generated by the sugar industry; (4) maintaining a viable rural economy; (5) economic self-sufficiency; (6) general quality of life. Secretary's Brief at 15.

This list, of course, explains the many reasons why the Puerto Rico government wants to protect its domestic sugar industry. It does not, however, distinguish the government's policy from "simple economic protectionism." Further, the Court finds that the government's non-economic justifications are purely speculative, if not outright contradicted by the evidence. Though the repackaging prohibition has been in place for over a decade, the domestic sugar industry -- both in terms of acreage devoted to sugar production, and persons employed by the industry -- continues to decline. Thus, the non-economic considerations asserted by the Secretary can not justify the burden on interstate commerce imposed by Regulation 13.

iii. Summary of Commerce Clause Analysis

The findings of the Court up to this point can be summarized as follows: (1) Regulation 13 facially discriminates against interstate commerce; (2) the Secretary has failed to assert a compelling interest, aside from economic protectionism, to justify Regulation 13's discriminatory purpose and effect; (3) therefore, Regulation 13 violates the Commerce Clause of the United States Constitution. City of Philadelphia, 437 U.S. 617, 624; C & A Carbone, 114 S. Ct. at 1683.

2. The Equal Protection Challenge

The Supreme Court has noted the "connection between the rationality analysis under the Equal Protection Clause and the balancing of interests under the Commerce Clause." Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 470 n.14, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981). Thus, much of the preceding discussion is applicable here, and need not be repeated.

The standard courts must apply in an Equal Protection claim is well known: "Absent a suspect classification or a fundamental right, courts will uphold economic and social legislation that distinguishes between two similarly situated groups as long as the classification is rationally related to a legitimate government objective." Fireside Nissan Inc. v. Fanning, 30 F.3d 206, 219 (1st Cir. 1994) (citations omitted).

Regulation 13 distinguishes between local producers of sugar and out-of-state producers who wish to import. The former can pack sugar for direct sale to consumers while the latter cannot. The Secretary asserts that this distinction is made in order "to protect the local sugar industry." Secretary's Brief at 25. As we have seen, however, this is not a legitimate government objective. Metropolitan Life Insurance Co., 470 U.S. at 880.

The Equal Protection analysis need go no further. Because the distinction made by the Regulation fails to further a legitimate government objective, the Court finds that it would likely be found unconstitutional at a full trial on the merits. Plaintiffs' claim, therefore, satisfies the "likelihood of success" requirement for a preliminary injunction.

b. The Potential for Irreparable Injury

Plaintiffs assert they will suffer irreparable injury unless the preliminary injunction is granted because: (1) they will lose the opportunity to enter and supply a significant percentage of the table sugar market; and (2) the deprivation of their constitutional rights -- as established above -- constitutes irreparable injury in and of itself. Plaintiffs' Brief at 3-4.

Addressing the latter argument first, a well known treatise, cited by plaintiffs, states that, "when an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." 11A Wright & Miller, Federal Practice and Procedure: Civil 2d § 2948.1 at 161. The rule in our Circuit, however, is not so clear cut. In Public Serv. Co. of New Hampshire. v. Town of West Newbury, 835 F.2d 380, 382 (1st Cir. 1987), the Court observed that cases holding that the deprivation of a constitutional right constitutes a sufficient showing of irreparable harm "are almost entirely restricted to cases involving alleged infringements of free speech." The Court further noted that even the assertion of "First Amendment rights does not automatically require a finding of irreparable injury." Id. (emphasis added). More recently, however, the Court appeared to accept a plaintiff's assertion that the deprivation of constitutional rights guaranteed by the dormant commerce clause would constitute irreparable injury. Fireside Nissan, 30 F.3d at 211 (citations omitted).

A recent, well-reasoned opinion from another district surveyed the cases and concluded that there was no general rule. Atlantic Coast Demolition and Recycling Inc. v. Board of Chosen Freeholders of Atlantic County, 893 F. Supp. 301, 308-09 (D.N.J. 1995). The Court opined that the lack of a bright line rule was appropriate given the equitable nature of injunctive relief, and that the best approach is to consider the deprivation of a plaintiff's rights under the dormant commerce clause (or any other constitutional provision) as a factor in assessing irreparable injury. The ensuing analysis of plaintiffs' claim of irreparable injury follows the approach suggested in Atlantic Coast Demolition.

Plaintiffs' other irreparable injury argument depends on the effect Regulation 13 has on their businesses. For the purposes of a preliminary injunction, however, there is no "irreparable injury where only money is at stake and where plaintiff has a satisfactory remedy at law to recover the money at issue." Foxboro Co. v. Arabian American Oil Co., 805 F.2d 34, 36 (1st Cir. 1986). On the other hand, recognizing that "timing is everything" in business, the First Circuit has recognized that the frustration of a business opportunity can constitute irreparable injury. Hyde Park Partners v. Connolly, 839 F.2d 837, 853 (1st Cir. 1988).

Here, plaintiffs do make a purely monetary argument: Lost profits from unconsummated sales to the consumer market, they argue, cannot be recouped from sales in other markets. As volume sellers, they could make such sales anyway. This purely monetary argument does not constitute irreparable injury for the purposes of a preliminary injunction.

Plaintiffs also point out, however, that they are singularly situated to enter the consumer table sugar market at this time. There is an impending shortage of Puerto Rico produced sugar. Grocery stores will need to look elsewhere than to their regular supplier, the Sugar Corporation, to meet their

customers' demands. This is a unique opportunity for plaintiffs to establish the necessary business relationships for the future. The operation of Regulation 13 frustrates this opportunity. Transcript at 308-10 (Gonzalez Freyre testimony). The Court finds that this argument, together with plaintiffs' showing that Regulation 13 violates their constitutional rights, supports plaintiffs' contention that a preliminary injunction is necessary to avert irreparable injury.

c. Balancing of the Relevant Equities and the Effect on the Public Interest

The last two factors also weigh in the favor of plaintiffs. The government's interest in maintaining its state-run monopoly is clearly outweighed by the plaintiffs' interest in exercising their Constitutional right to try to participate in that market. Further, as we have seen, the putative public benefits which accrue from Regulation 13 are speculative at best, if not illusory. The harm it engenders, however, is well-documented. Puerto Ricans pay more for sugar than they would otherwise.

I also find speculative the government's assertion of the damage that will result from granting the injunction. The Secretary has not definitively shown that the invalidation of Regulation 13 necessarily means the death knell of the Puerto Rico sugar industry. Perhaps the competition might be the spur the industry needs to enable it to compete.

Thus, the Court finds that the last two prongs of the requirements for a preliminary injunction are satisfied.

V. Conclusion

As the above discussion demonstrates, plaintiffs would likely prevail on their contention that Regulation 13 is unconstitutional. Plaintiffs have also demonstrated that continued implementation of Regulation 13 will cause them irreparable injury. Furthermore, consideration of the comparative equities and of the public interest both weigh in

favor of plaintiffs. Therefore, in light of these findings and the special emphasis placed on the "likelihood of success" prong by the First Circuit, the Court finds that plaintiffs' suit for a preliminary injunction must be GRANTED.

In light of this Opinion and Order, the Court sets a status conference for January 11, 1996, to discuss with the parties the approach that should be taken to resolve the remaining matters pending in this case.

IT IS SO ORDERED.

San Juan, Puerto Rico, December 21, 1995.

JUAN M. PEREZ-GIMENEZ

U. S. District Judge

FOOTNOTES

[1] The rationale for the Court of Appeals' reversal was overruled in Dennis v. Higgins, 498 U.S. 439, 451, 112 L. Ed. 2d 969, 111 S. Ct. 865 (1991) (holding that 42 U.S.C. § 1983 is a permissible cause of action for claims under the Commerce Clause). See Bauza Salas, 862 F.2d at 909.

[2] The following data illustrates this decline:

| Year | Acreage Devoted to Sugar Production n 1 | Production n 2 | $ Value n 3 |
|---|---|---|---|
| 1890 | 70 | 103 | 4.7 |
| 1910 | 145 | 350 | 23.5 |
| 1920 | 240 | 485 | 98.9 |
| 1950 | 367 | 1,286 | 100.8 |
| 1970 | 189 | 455 | 52.6 |
| 1980 | 85 | 175 | 56.1 |

n1 thousands of acres
n2 thousands of tons
n3 millions of dollars (not adjusted for the effects of inflation)

Source: Puerto Rico A-Zeta, Agriculture, p. 30.

[3] The Sugar Corporation is a public corporation, but with a separate and distinct legal personality apart from the Government of Puerto Rico. Sugar Corporation of Puerto Rico v. Environeering, Inc., 520 F. Supp. 996, 998-99 (D.P.R. 1981) (citing P.R. Laws Ann. tit. 28, § 242(c)). The Sugar Corporation arranges the refinement and distribution of Puerto Rico-produced sugar to the island's consumers. It is subject to all the Commonwealth's regulations of the sugar

industry, including the one at issue in this case. Transcript at 240-60 (Defendant Soto's Testimony). The Sugar Corporation is not a party to this suit.

[4] The witnesses differed on the number of persons employed in the sugar industry, ranging from 8,000 (cited by the Secretary, Transcript at 279) to 20,000 (cited by Jose Joaquin Villamil, Transcript at 445). Further, many of the positions are seasonal. These differences are occasionally reflected in this opinion.

[5] The Complaint makes three other claims, discussion of which is confined to this footnote. The first is plaintiffs' Fifth Amendment "Takings" argument. Pursuant to the detention order, plaintiffs remain in possession of the sugar. They are simply not permitted to do with it as they please, i.e., repack it for consumer sales. Other viable channels for selling the sugar remain available. Thus, the detention order cannot constitute a Taking under the Fifth Amendment.

The second is plaintiffs' contention that Regulation 13 violates their substantive rights under the Due Process clause. However, plaintiffs have no identifiable "liberty interest" in selling sugar to Puerto Rico's consumer market. See Fireside Nissan, Inc. v. Fanning, 30 F.3d 206, 219 (1994). This, combined with the Supreme Court's refusal to strike down an economic regulation for violating substantive due process in almost 50 years, suggests that Regulation 13 survives this Due Process challenge.

The third is plaintiffs' procedural Due Process challenge. Plaintiffs did not press the issue at the hearing, nor in their brief. Thus, they appear to have abandoned the argument. Further. the Secretary has demonstrated that the claim is meritless. Transcript at 417-27 (Migdalia Ramos testimony).

Therefore, the claim is denied.

[6] Because this matter is before the Court on plaintiffs' request for a preliminary injunction, all findings as to the merits of the various issues presented are to be understood as statements of probable outcomes. Repeated reference to this fact is eliminated at each relevant juncture for purposes of brevity and simplicity. See Planned Parenthood of Massachusetts v. Bellotti, 641 F.2d 1006, 1009 (1st Cir. 1981).

[7] That plaintiffs' sugar was imported from Brazil does not alter the analysis. First, of course, it has no bearing on plaintiffs' facial challenge. Second, because the regulation requires "local processing," it restricts importation of the service without regard to the sugar's place of origin. Third, and perhaps most importantly, plaintiffs are U.S. citizens whose business interests are frustrated by local regulations which further purely parochial protectionist interests. Given the Court's broad definition of inter-state commerce, see, e.g., Wickard v. Filburn, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942), the dormant commerce clause should be operable here.

[8] Even if Regulation 13 could be characterized as non-discriminatory -- which no amount of inventiveness would seem to permit -- it would still not survive Commerce Clause scrutiny since, as discussed below, the protection of the local industry is the only asserted justification for the repackaging prohibition. See Pike, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844.